76-28

In the Supreme Court of the United States

MISC. NO. _____

October Term, 1976

HAROLD S. GOLDEN and DAVID FINCHER,
Petitioners,

vs.

BISCAYNE BAY YACHT CLUB; MAURICE A. FERRE, Mayor, City of Miami, Florida; THEODORE GIBSON, MANOLO REBOSO, ROSE GORDON and J. L. PLUMMER, City Commissioners of the City of Miami, Florida,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

INDEX

INDEX TO APPENDIX

TABLE OF CITATIONS

TABLE OF CITATIONS (cont.)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

The Petitioners, by undersigned counsel, respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 15, 1976.

OPINION BELOW

The opinion of the Court of Appeals, *en banc*, is reported at 530 F.2d 16. The original panel decision, which held in favor of the Petitioners, is reported at 521 F.2d 344. The District Court decision, which also held in favor of the Petitioners, is reported at 370 F.Supp. 1038. Copies of all three opinions are included in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 15, 1976. This Petition was timely filed. The jurisdiction of this Court is based upon Title 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I.

HAS THE CITY OF MIAMI, FLORIDA, BY VIRTUE OF THE SPECIAL CIRCUMSTANCES INVOLVED IN ITS LEASING OF PUBLIC BAY BOTTOM LAND TO A PRIVATE YACHT CLUB WHICH PRACTICES RACIAL AND RELIGIOUS DISCRIMINATION, SANCTIONED, FOSTERED, ENCOURAGED OR IDENTIFIED ITSELF WITH THE

DISCRIMINATORY POLICIES OF THE CLUB IN SUCH A MANNER AS TO CONSTITUTE STATE ACTION WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT?

II.

DOES THE DEGREE OF STATE ACTION NECESSARY TO IMPOSE FOURTEENTH AMENDMENT RESTRAINTS UPON "PRIVATE" RACIAL AND RELIGIOUS DISCRIMINATION DIFFER FROM THAT WHICH IS NECESSARY TO IMPOSE FOURTEENTH AMENDMENT RESTRAINTS UPON OTHER TYPES OF "PRIVATE" UNCONSTITUTIONAL CONDUCT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV

. . . nor shall any state deprive any person of life, liberty or property without due process of law . . .

Title 42 U.S.C. §1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be sub-

> jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Harold S. Golden and David Fincher sought membership in the Biscayne Bay Yacht Club in Miami, Florida. The Yacht Club never had a black member, except for an honorary membership bestowed upon the Commodore of the Jamaica Yacht Club. The Club never had a Jewish member. Golden is Jewish. Fincher is black. Each attempted to apply for membership in the Club, but were refused. Thereafter, they brought suit pursuant to Title 42 U.S.C. §§1981, 1983 and 2000(a), challenging the admissions policies of the Club.[1]

The Biscayne Bay Yacht Club's docks are on bay bottom land leased from the City of Miami at $1.00 per year. The District Court found that the land is "essential to the Club's functioning as a Yacht Club." *Golden v. Biscayne Bay Yacht Club*, 370 F.Supp. 1038, 1040. It also determined that permission to construct the docks on the land was to "help relieve the acute shortage of *public* dock facilities in the City of Miami." *Id.* at 1040 (emphasis in original). Furthermore, the lease incorporated City racial

[1]In its present posture this case presents only the §1983 issue. After prevailing in the District Court on that issue, the Petitioners took no cross appeal from the failure of the District Court to find or assert jurisdiction under any other Civil Rights Statutes. See, *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 17, n. 1.

and religious nondiscrimination ordinances, *Id.* at 1040, 1041, which the city failed to enforce although aware of the violations.

The District Court concluded that the Yacht Club did engage in discriminatory admission policies. *Id.* at 1044. As a result, only white, Christian boaters had use of the Club's pier facilities which rested on public land. Holding that the City's involvement with the Club created a "symbiotic relationship," the District Court found there to be sufficient state action to impose Fourteenth Amendment Constitutional restraints and enjoined the Yacht Club from "barring . . . membership to applicants solely on account of their race or religious affiliations." *Id.* at 1044.

The Yacht Club appealed and the Fifth Circuit affirmed the decision of the District Court. *Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344 (5th Cir. 1975).

The Club successfully petitioned for rehearing *en banc* and the *en banc* Court, in a nine to five decision, reversed the original panel ruling, holding that the relationship between the City and the Yacht Club did not constitute state action. The majority opinion stated:

> On the law as above discussed, and on the facts as above recited, we have the same opinion of this case that the Supreme Court had in *Moose Lodge* [*No. 107 v. Irvis*, 407 U.S. 163 (1972)], supra; the facts and circumstances fall far short of the symbiotic relationship found in *Burton* [*v. Wilmington Parking Authority*, 365 U.S. 715 (1961)], supra. As a matter of law and fact, they fall short of establishing that the City of Miami

has so far insinuated itself into a position of interdependence with the club that it must be recognized as a joint participant in the internal membership policies of the club. The City of Miami has not significantly involved itself in those membership policies. The lease does not provide a sufficiently close nexus between the city and the club so that the action of the club may be fairly treated as that of the city.

Golden v. Biscayne Bay Yacht Club, 530 F.2d 16, 22.

The *en banc* dissent offered a different view:

We understand the majority opinion to hold that the fact that a private club leases some of the property it uses from a governmental entity is not enough in itself to imbue the private club's discriminatory activities with "state action." Whatever the validity of that holding as a legal proposition, we are convinced that the result reached by the majority is incorrect, because several unique factors relating to this particular lease were not properly taken into account in the majority opinion.

The panel opinion, 521 F.2d 344, as does this dissent, discussed these special considerations which mandate the conclusion that "much more is involved than simple ownership and lease" 521 F.2d at 352. This was a lease of waterbottom land abutting very valuable property—we can take judicial notice that this lease was worth considerably more than $1.00, and thus that the

financial accommodation here had the same effect as would a fair market value lease combined with a large subsidy given from the city to the club. The lease arrangement between the club and the city was grounded, pursuant to a state requirement, on a condition that the club would be performing a "public purpose," viz, providing private dock space which would to some extent relieve the overcrowded public docks. The city at one point had recognized, through ordinance, that as trustee of a limited and valuable public resource, it had an obligation to insure that any private clubs given exclusive access to parts of that resource would not practice invidious discrimination. The club failed to comply with that ordinance, although the prohibition of invidious discrimination had been made part of the lease, and the city refused to enforce the ordinance, despite clear notice of the violation.

This Court need not decide whether any one of these considerations, standing alone, would be sufficient to support a finding of state action. Rather, we need only pass on whether the cumulation of these considerations develops an image of "significant state involvement." For us, all the facts and circumstances lead to only one conclusion—the cumulation of the various aspects of the city-club relationship colors the club's policies of racial and religious discrimination with state action.

Golden v. Biscayne Bay Yacht Club, 530 F.2d at 33.

The *en banc* majority saw involvement in membership policies of the Club as the *sine qua non* for state action. The dissent foresaw the danger of that approach:

> Today the Court opens the door to subterfuge because well within the bounds of this opinion a governmental entity may accomplish indirectly what it could never do directly by leasing public property to a private segregated organization and then disavowing any direct participation in the discriminatory membership policies.
>
> *Id.* 530 F.2d at 32.

This Petition for Writ of Certiorari seeks review of the *en banc* majority's conclusion as to state action and poses the question of whether, in the context of racial and religious discrimination state action can be avoided by a disavowal of direct participation in the discrimination perpetuated by the "private" entity.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW PRESENTS AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW WHICH AFFECTS THE RIGHTS OF ALL CITIZENS AND THE OBLIGATIONS OF GOVERNMENTAL ENTITIES TO PROTECT THOSE RIGHTS.

The importance of the issues presented in this case was made apparent in an opening paragraph of the *en banc* decision:

> So far as can be determined from a diligent search of the precedents, this is the first time in the history of Fourteenth Amendment jurisprudence that a federal district court has undertaken the supervision of the membership policies in a genuinely private club.
>
> *Golden v. Biscayne Bay Yacht Club*, 530 F.2d at 17.

A decision to supervise or not to supervise affects the constitutional rights of all citizens. On one hand, "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-180 (1972), Douglas, J., dissenting. However, those associational rights must be exercised independent of significant state involvement and support. *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974). Such involvement infringes upon the constitutional and statutory rights of those discriminated against to be protected from denials of equal protection of the law.

Thus, any state action case involving racial and religious discrimination poses important legal problems affecting the general public. The fact that decisions in these cases instruct governmental bodies of their obligations to protect Fourteenth Amendment rights when dealing with private discriminatory organizations, and the limits of

their involvement with those organizations, adds to the public importance of such cases.[2]

The opinion below is of special concern. Unlike the state action cases previously presented, *Burton*, *Moose Lodge*, and *Gilmore*, it presents a question of religious as well as racial discrimination—a dual bias which offends the principles upon which our nation was built. The creation of the Rhode Island Colony in 1636 by Roger Williams was the cornerstone guaranteeing freedom from religious discrimination. The Civil War and its constitutional and statutory aftermath laid the foundation for terminating racial discrimination. At issue here are vestigial practices which may sharply conflict with those notions of liberty.[3]

[2]Judge Coleman, in his dissent to the original panel decision, raised the spectre of an end to private clubs because of their ties to property held in trust by the government:

> I now take a look at other practical effects of this decision. All around the Gulf of Mexico, the waterbottoms are publicly owned. They are trust property and cannot be sold. They can only be leased for a term of years. Under this decision we say farewell to private yacht clubs, private hunting clubs, or any other private club operating on such property and leased exclusively to a named private lessee.

Golden v. Biscayne Bay Yacht Club, 521 F.2d at 356.

Implicit in his suggestion is the fact that those clubs practice racial and religious discrimination. If they did not, there would have been no need to say farewell to them under the original panel decision. By reversing that decision, the *en banc* Court has now bid welcome to discrimination by private clubs benefiting from state aid. Governmental bodies, with obligations to all of their constituents, should welcome a decision by this Court further clarifying their duties when dealing with such clubs.

[3]The religious bias aspect of this case may have special magnitude as a result of the decision in *Runyon v. McCrary*, — U.S. —, 44 L.W. 5034 (June 25, 1976). Some private discrimination can now be enjoined under 42 U.S.C. §1981 without showing state action. But only §1983 and its requirement of state action will be available to remedy religious discrimination. Thus, we may have the anomaly of an organization's racial bias being banned, but their religious bias tolerated by law.

The division in the *en banc* Court of Appeals is of significance because it underscores how firmly the majority and the dissent believe their respective assessments are correct. Assessments which are wholly based upon this Court's instruction that:

> Only by sifting facts and weighing circumstances [on a case-by-case basis] can the non-obvious involvement of the State in private conduct be attributed its true significance.
>
> *Burton v. Wilmington Parking Authority*, 365 U.S. at 722.

Using the guidelines set by this Court, the District Court Judge and five Court of Appeals Judges have found state action. Nine Court of Appeals Judges have found no state action. There is no factual dispute presented. The issue is merely the application of the governing law of *Burton*, *Moose Lodge* and *Gilmore* to undisputed facts.

Since this Court is the ultimate arbiter of Constitutional principles, and since three lower court decisions have struggled to apply the Court's guidelines in a case which affects the general population and the duties of governmental entities, it is vital that the question of state action be resolved by this Court.[4]

[4]The Petitioners, of course, contend that the decision below was erroneous. Chief Judge Brown's dissent carefully details the confluence of facts which support the state action position. We do not belabor the argument that the *en banc* majority was wrong because we recognize that position, standing alone, is not enough to exercise the certiorari power of this Court. But we believe that the importance of the question plus the doubtful determination of the Court below adds weight to this Petition. See *Williams v. Lee*, 358 U.S. 217, 218 (1959), in

II.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN GILMORE V. CITY OF MONTGOMERY, 417 U.S. 556 (1974).

In *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), the Court prohibited the exclusive use of public property by organizations which practiced racial discrimination. The Court noted that "if the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger." *Id.* 417 U.S. at 574.

The bay bottom is a freely accessible facility. Boats manned by sailors of all colors and religions "anchor out" on it. But not on the bay bottom controlled by the Yacht Club. There only white, Christian boaters tie up. The City of Miami was aware of the discrimination. The City officials had a duty to enforce their own ordinances prohibiting it; just as in *Gilmore*, the "city's officials were aware of this [desegregation] order and were responsible for seeing that no action on their part would significantly impede the progress [of desegregation]. *Id.* 417 U.S. at 568.

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which the Court granted certiorari because of the 'important question" and a "doubtful determination" by the lower court.

And, insofar as the decision below opens the door to subterfuge by permitting a governmental body to deny participation in the discriminatory practices, and thus threatens the effectiveness of §1983 as a remedy for enforcing the Fourteenth Amendment, we invoke the analogous language of *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 136 (1968). There certiorari was granted "because the rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the anti-trust policy of the United States."

The action (and inaction) of the municipal officials in *Gilmore* and *Golden* are similar. If state action was present in *Gilmore*, it is present in *Golden*. The *en banc*'s contrary conclusion therefore conflicts with *Gilmore*.

III.

THE DECISION BELOW PRESENTS IMPORTANT CONSTITUTIONAL ISSUES WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

"[T]he question whether particular conduct is private on the one hand, or state action on the other, frequently admits of no easy answer. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-350 (1974). Thus, the "sifting" approach has evolved as the method for seeking the solution to the question. *Gilmore v. City of Montgomery*, 417 U.S. at 574.

In the process of resolving state action issues, this Court has not stated that claims of racial discrimination require a finer sifting. But Courts of Appeal have distinguished "between the degree of state action necessary to impose constitutional restraints in cases concerning racial discrimination and the high degree of state involvement which is necessary for private conduct to be subjected to Fourteenth Amendment sanctions when other types of constitutional violations have occurred. The Court's willingness to find state action more readily in racial discrimination cases is not hard to explain. After all, such discrimination was the very condition that precipitated the enactment of the Fourteenth Amendment." *Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344, 350-351

(footnotes omitted). Several circuits have noted the distinction. See, *Greco v. Orange Memorial Hospital Corp.* 513 F.2d 873, 879-880 (5th Cir. 1975); *Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1974); *Powe v. Miles*, 407 F.2d 73, 82 (2d Cir. 1968); *Edwards v. Habib*, 397 F.2d 687, 693 (D.C. Cir. 1968). See also, Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 Colum. L.Rev. 656, 657 (1974); Comment, *State Action and the Burger Court*, 60 Va.L.Rev. 849 (1974).

Thus, two novel questions are presented in the instant case: (1) does the degree of state action necessary to impose Fourteenth Amendment restraints upon private racial discrimination differ from that which is necessary to impose those restraints upon other types of private unconstitutional conduct; and (2) if so, does the higher standard also apply to religious discrimination?

The answers to these important queries would provide additional guidance to the Courts of Appeal in state action claims. The issue of state action is not a *rara avis*. Certiorari should be granted to provide that guidance.

CONCLUSION

For the foregoing reasons, Petitioners request that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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July, 1976

APPENDIX

APPENDIX

Harold S. GOLDEN and David Fincher,
Plaintiffs-Appellees,

v.

BISCAYNE BAY YACHT CLUB et al.,
Defendants-Appellants.

No. 74-1349.

United States Court of Appeals,
Fifth Circuit.

April 15, 1976.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL,* THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MORGAN, CLARK, RONEY, GEE and TJOFLAT, Circuit Judges.**

COLEMAN, Circuit Judge.

A city leased to a private yacht club the bay bottom land underlying club-constructed and club-maintained dock facilities connected to the club lands on shore. The club thus had exclusive use and control of the docks, a situation which had existed long before the lease was executed. The

*Bell, Circuit Judge, heard oral argument and participated in conference en banc. He concurred in this opinion (the comments on the dissenting opinion excepted) on January 29, 1976, prior to his resignation on March 1, 1976.

**Dyer, Circuit Judge, did not participate in the consideration or disposition of this appeal.

District Court held that the existence of the lease, and that alone, amounted to significant state involvement with the membership policies of the club, 42 U.S.C., § 1983, Golden v. Biscayne Bay Yacht Club, 370 F.Supp. 1038 (S.D.Fla., 1973). The lease and the use of the docks were left undisturbed. Instead, it was ordered and adjudged:

"1. That the policy, practice and custom of defendant Biscayne Bay Yacht Club in denying membership to the members of the Jewish religion and Black race is hereby declared violative of the Fourteenth Amendment to the United States Constitution.

"2. Defendant Biscayne Bay Yacht Club is hereby ordered to cease the barring of membership to applicants solely on account of their race and religious affiliations. 370 F.Supp., at 1044.

"3. Jurisdiction is retained for the enforcement of the decree."

The judgment of the District Court was affirmed by a panel of this Court, one Judge dissenting, Golden v. Biscayne Bay Yacht Club, 5 Cir., 1975, 521 F.2d 344.[1]

So far as can be determined from a diligent search of the precedents, this is the first time in the history of Fourteenth Amendment jurisprudence that a federal district

[1]The Panel majority held, 521 F.2d at 348, that "Here is involved a claim of racial and religious discrimination which seems clearly to fall within the 'zone of interest' of the statutory language of 42 U.S.C.A., § 1983". There was no cross appeal from the failure of the District Court to find or assert jurisdiction under any other Civil Rights statutes. The District Court decided only the § 1983 issue. We do the same.

court has undertaken the supervision of membership policies in a genuinely private club. A majority of the Judges of this Court in active service, one Judge not participating, granted rehearing en banc.

Upon a thorough sifting of the facts and circumstances of this case, we are of the opinion that the bay bottom lease did not supply the requisite Fourteenth Amendment significant state involvement in the membership policies of the private club. Accordingly, we reverse the judgment of the District Court and remand the case with directions to dismiss the complaint.

Prologue

There are undisputed considerations which, at the outset, ought to be taken into account.

The lessor was the City of Miami, organized in 1896. The lessee was the Biscayne Bay Yacht Club, organized in 1887.

The case does not come here as a class action.

The club was genuinely private. The District Court so found, and additionally held that "it certainly was not formed as a subterfuge to evade the civil rights laws", 370 F.Supp., at 1041. It performed no public function; it did nothing that had ever been a public function. It neither receives nor spends funds allocated from any public source. The city had no part, and took not part, in the operations or internal policies of the club. As to membership policies, the District Court found that there was no evidence that the city had been aware of any discrimination practiced

by the club which would require termination of the lease, 370 F.Supp., at 1044.

The Panel majority opinion held that "the City provided substantial financial aid to the Club by making the bay bottom land available for the token rental of $1.00 per year", 521 F.2d 352. If the District Court considered this point it failed to mention it and made no finding that the city contributed in any way, substantial or otherwise, to the financial support of the club.

To be more specific, the District Court noted:

> "Except for the existence of the lease, the City of Miami has never participated in or been involved in the operation of the Club."

370 F.Supp., at 1040.

A fortiori, the issue on this appeal is whether the lease, the sole nexus between city and club, supplied the significant state involvement required to activate 42 U.S.C., § 1983.[2]

The Law

This is not the kind of case in which we are left to flounder blindly in search of the applicable law. On several

[2] "§ 1983. Civil action for deprivation of rights
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

occasions in the recent past the Supreme Court, as more specifically discussed hereinafter, has carefully surveyed the field and articulated principles governing significant state involvement in private activities.

[1, 2] The purpose of the Amendment and of the statute, 42 U.S.C. § 1983, is to preserve and enforce, as against state action, those rights, privileges, and immunities "secured by the Constitution and laws". In the absence of impermissible state involvement, it would hardly be argued that membership in a private club, at the option of the applicant, is a right or privilege enforceable in the federal courts or anywhere else. Unless and until state action, or action taken under color of state law, significantly enters the lists on the side of impermissibly discriminatory results, the internal membership policies of a genuinely private club furnish no grist for the federal judicial mill. See, e.g., The Civil Rights Cases, 1883, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835; Shelly v. Kraemer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; Cooper v. Aaron, 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5; Evans v. Abney, 1970, 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d. 634; Moose Lodge No. 107 v. Irvis, 1972, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627.

We begin our analysis with a thoroughgoing recognition of the teachings of a pioneer case in the field now specifically under consideration, Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45.

Burton was a racial discrimination case. The object of the complaint was a restaurant, leased from a state agency, housed in a building owned and operated by that agency.

The lease was needed to produce revenue to finance the construction of the building. To a certain extent the restaurant enjoyed a portion of the tax exempt status of its state owned landlord. The state agency furnished heat and repairs; it received rent in the amount of $28,700 per annum.

The state court held that the restaurant operated in "a purely private capacity".

The Supreme Court reversed, noting that the land and building were publicly owned, that the building was dedicated to public uses, the leased areas were not surplus state property, they constituted a physical and financial integral, and they were an indispensable part of the State's plan to operate the project as a self-sustaining unit. The operation conferred mutual benefits upon lessor and lessee. Of no small moment was the fact that "profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency".

The conclusion was that:

> "The State has so far insinuated itself into a position for interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."
>
> 365 U.S., at 725, 81 S.Ct., at 862, 6 L.Ed.2d, at 52.

The standard first announced in Burton, "that the State had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise," was reiterated in Jackson v. Metropolitan Edison Company, 1974, 419 U.S. 345, 357, 95 S.Ct. 449, 457, 42 L.Ed.2d 477, 487. Jackson was not a racial discrimination case but the Court noted:

> "Petitioner advances a series of contentions which, in her view, lead to the conclusion that this case should fall on the Burton side of the line drawn in the Civil Rights Cases, supra, rather than on the Moose Lodge side of that line. We find none of them persuasive."
>
> 419 U.S., at 351, 95 S.Ct., at 454, 42 L.Ed.2d, at 484.

Burton and Moose Lodge were racial discrimination cases. The Supreme Court accepted them as lines of demarcation in Jackson's case, although it did not involve racial discrimination. The standard, state insinuation into a position of interdependence so as to become a joint participant in the challenged private activity, has been used by the Supreme Court in both racial and non-racial cases. The basic principle remains the same in either type case: the facts either establish or do not establish significant state involvement in the private activity.

In a § 1983 case involving alleged racial discrimination by a private club, the charge we have before us here, the Supreme Court said:

> "[W]here the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations'." Moose Lodge, supra, 407 U.S., at 173, 92 S.Ct., at 1971, 32 L.Ed.2d, at 637.

The Court extensively discussed Burton, supra, with obvious approval, and found "nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton", at 175, 92 S.Ct., at 1972, 32 L.Ed.2d at 638.

The Court further informed us that the issue of significant state involvement in private activities may be resolved only "by sifting facts and weighing circumstances", at p. 172, 92 S.Ct., at 1971, 32 L.Ed.2d, at 637. Burton, of course, told us in 1962 that the Amendment's embrace "can be determined only in the framework of the peculiar facts or circumstances present", that is, on a case by case basis.

In any event, the Supreme Court told us in Jackson, supra, 419 U.S., at 351, 95 S.Ct., at 453, 42 L.Ed.2d, at 484, citing Moose Lodge, 407 U.S., at 176, 92 S.Ct., at 1973, 32 L.Ed.2d at 639:

> "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." (Emphasis added).

In this connection, we recall Greco v. Orange Memorial Hospital, 5 Cir., 1975, 513 F.2d 873, which involved a tax exempt hospital mandatorily open to the general public,

presumably burdened with all the nondiscriminatory duties owed all persons within the public domain. Racial discrimination was not at issue, but significant state involvement in the operation was. The county owned the hospital and the land on which it stood, costing $3,682,000 in public funds. It was leased from the county under what amounted to a perpetual lease for $1.00. In at least eight respects the county retained control over the hospital. However, the county participated neither directly nor indirectly in the formulation of the disputed hospital policy (denial of elective abortions). 513 F.2d at 881.

In the light of those facts, this Court concluded:

> "In summary, we find that Orange County is not sufficiently connected with the Orange Memorial Hospital Corporation's activities to imbue those actions with the attributes of the state." 513 F.2d, at 882.

With the Chief Justice and Mr. Justice White dissenting because of conflicts within the Circuits, the Supreme Court denied certiorari, Greco v. Orange Memorial Hospital (1975, 44 U.S.L.W. 3328) ____ U.S. ____, 96 S.Ct. 433, 46 L.Ed.2d 376.

Facts

The law is plain.

We now proceed to the sifting of the facts and circumstances. The basic facts are not in dispute—only the proper legal conclusion to be drawn from those facts is at issue. The clearly erroneous rule does not come into play.

As already noted, the Biscayne Bay Yacht Club is a genuinely private club. So far as the record shows, it has never had any black or Jewish members. It was not founded for the purpose of evading any Civil Rights laws. Its existence antedates that of the city from which it holds a bay bottom lease.

The club does not now perform, and has never performed, any public function. It receives no support from the public treasury and has never received any. It does have the exclusive use of dock facilities of its own construction and maintenance, for which it pays the City of Miami one dollar for a lease on the waterbottoms over which those facilities are constructed. There is no finding in this record that the lease fee is grossly inadequate, amounts to subsidy for the club, or represents a substantial financial contribution to the operation of the club.

The club does not monopolize access to or the use of the public waters of Biscayne Bay. The District Court did not suggest, nor is there any substantial reason to believe, that the club significantly interferes with such use or access. Indeed, public dock facilities are located near those of the club. The District Court made no finding, and we do not know, how many private docks extend into the Biscayne Bay waterfront, by the hundreds or otherwise, nor do we know how many are built over bay bottoms leased from the city, or for what consideration paid the city.

We do know, for the District Court so found, and it is undisputed, that "except for the existence of the lease, the City of Miami has never participated in or been involved in the operation of the Club", 370 F.Supp., at 1040. This means, of course, that the city played no part whatever in

the membership policies of the club. The District Court found that there was no evidence before the Court that the City of Miami was "aware of the discrimination practiced by the Biscayne Bay Yacht Club which would require the the City to terminate its lease", 370 F.Supp., at 1044.

There have never been any membership requirements or restrictions related to or predicated upon either race or religion but membership can be obtained only by sponsorship of three club members and by secret ballot of the club. The result of this internal membership policy has been, and is, that the club has no black or Jewish members.

On these facts, the Court held that the lease to the bay bottoms underlying the dock facilities was "essential to the club's operation", that it was "vital to the operation of a yacht club", and that the " 'symbiotic relationship' between the state and the Club exists, thereby making any discriminatory action by the Club a violation of the Fourteenth Amendment (citing Burton)", 370 F.Supp., at 1042.

The Lease History

The first yacht race on Biscayne Bay, with fifteen boats participating, took place on Washington's birthday, 1887, about nine years before the City of Miami became an organized municipality.

Shortly afterwards the Biscayne Bay Yacht Club was organized at the Peacock Inn. The club was incorporated under the laws of Florida in 1893 and subsequently reincorporated as a non-profit corporation in 1969.

The club room remained at Commodore Monroe's boathouse until 1909. It then moved into its own building, a

two story structure, built on piling at the end of the dock, but still on the Commodore's property. Later, a new station on the bayfront a short distance north of Flagler Street was built over the water, with a long dock in front. This had to be abandoned in 1925 because of the construction of the Bayfront Park. Another building was leased but the club soon fell on hard times, caused by the hurricane of September, 1926, by the collapse of the Florida boom, and by the failure of the Bank of Bay Biscayne. In 1932, however, the club obtained its present property, located at 2540 South Bayshore Drive, Coconut Grove.

Thereafter, for thirty years, 1932-1962, things sailed along with clear skies, fair winds, glassy seas, and even keels. In 1962 the City of Miami asserted title to the bay bottoms under the dock facilities of the Biscayne Bay Yacht Club. This was thirteen years after 1949, when, for ten dollars, the Trustees of the Florida Internal Improvement Fund had conveyed portions, if not all, of the bay bottoms to the city. The 1962 assertion of title was handled by the club leasing the bay bottoms which supported its dock facilities for a dollar a year. The record suggests that this may have been done under protest but the District Court makes no finding as to whether the City of Miami actually had valid title to the bay bottoms or what the riparian rights of the club may have been. We are left with Footnote 2, 370 F.Supp. 1040, that "Neither side has raised the issue of whether riparian rights were vested in the Club prior to 1962". Nothing is said about riparian rights since 1962. In any case, the lease is there, the club is obviously accepting its benefits, whatever they may be, so we decide the case in the light of its existence.

It is not to be overlooked, however, that the 1962 lease wrought no change in a situation which had uninterruptedly been in effect for thirty years. The club had been there all the time. The docks had been there all the time. After the execution of the lease the club ran exactly as before. Indeed, there is nothing to indicate that anybody intended the lease to cause any change in those operations. The fact is that the City of Miami laid claim to title to the bay bottoms underlying the docks. The question was not litigated but was resolved by the execution of the lease.

Since the lease was the sole nexus between the city and the club, and since the District Court found that the lease significantly involved the city in the internal operations of the club, we do not know why the Court did not cancel the offending appendage and simply enjoin the use of the docks. In cases involving the attempted conversion of property formerly public into impermissible private uses this Court has cancelled leases and set aside sales. See, e.g., Wright v. City of Brighton, 5 Cir., 1971, 441 F.2d 447 (sale rescinded) and United States v. State of Mississippi, 5 Cir., 1974, 499 F.2d 425 (lease cancelled). This would have left this private club free to use its own club house, situated on its private property, as it saw fit, which, under the Constitution of the United States it clearly would have had the right to do. This, of course, would have forestalled federal court intervention into the internal affairs of a genuinely private club and it would have forestalled even the slightest claim of plaintiff-appellees to membership in the club.

Perhaps the outcome was influenced by a strong practical consideration. If the docks had been cut loose from the club they, for all practical purposes, would have been useless. No one could have obtained access to them or egress from them across the private property of the club. The ability to drive up in a boat or leave in a boat would have been

of little value if one were nevertheless marooned at that point from dry land.

Our Decision as to Significant State Involvement

[3] On the law as above discussed, and on the facts as above recited, we have the same opinion of this case that the Supreme Court had in Moose Lodge, supra; the facts and circumstances fall far short of the symbiotic relationship found in Burton, supra. As a matter of law and fact, they fall short of establishing that the City of Miami has so far insinuated itself into a position of interdependence with the club that it must be recognized as a joint participant in the internal membership policies of the club. The City of Miami has not significantly involved itself in those membership policies. The lease does not provide a sufficiently close nexus between the city and the club so that the action of the club may be fairly treated as that of the city.

Both the District Court and our Panel which originally heard this appeal obviously applied the "but for" rule to this situation. The Panel said "without the city's lease of the bed of the bay the club could not exist". Leaving aside the fact that this private club had been in operation for many years, with docks occupying the bay bottoms, before the city laid claim to title, we think the Supreme Court attributed little significance to the "but for" situation appearing in Moose Lodge. But for the liquor license the private club could not have sold drinks. It requires no huge store of imagination to know in 1976 that without the ability to supply drinks private clubs would, at best have a hard time existing. In any event, the "but for" element did not rear its head in the decision in Burton, which did involve a lease to public property, without which the restaurant could

not have existed. If the "but for" approach were enough, the Supreme Court could have swiftly disposed of Burton with one of the shortest per curiams on record. Neither is it to be overlooked that Burton was concerned with a place offering public accommodation, not a private club. See, Moose Lodge, supra, which was concerned with a private club. See, also, case note on the Panel decision in this case, 54 Texas Law Review 642 (1976).[3]

Some Incidental Issues

In June and July of 1968 the City of Miami enacted lengthy, extensive ordinances prohibiting any form of racial or religious discrimination by lessees of city owned land. The ordinances were not only prohibitory but prescribed affirmative action by the lessees, such as opening up membership rolls, prohibiting selection of members by secret ballot, directing that applicants for membership should not be required to have sponsors, and the like.

The District Court noted the existence of these ordinances, 370 F.Supp. 1040-1041. However, the case was decided solely on Fourteenth Amendment grounds. There is no cross assignment of error by the appellees, raising any issues of pendent jurisdiction relief. We consider, therefore, that we have only a § 1983 case.

The District Court did not consider or decide whether the Miami ordinances applied to bay bottom lessees. If the

[3] The author of the Texas Law Review article wrote: 'The cumulation of the factors relevant to state action analysis demonstrates that the state's involvement with the Biscayne Bay Yacht Club is insufficient to classify the club's exclusion of plaintiffs as state action. * * * Both policy and precedent require that the Fifth Circuit, considering the case en banc, reverse the panel's decision". [At 652].

ordinances do apply, it was not decided whether they provided appellees with an adequate remedy at law (forestalling injunctive procedures). Nothing was said about a failure to enforce the ordinances as possibly supplying grounds for Fourteenth Amendment relief. In short, the opinion and judgment below did not rely on the ordinances. We leave them where the District Court left them.

One final word. This is not a class action suit. There were two plaintiffs. Mr. Fincher is black. Mr. Golden is Jewish. About these plaintiffs the Court made the following cryptic comment:

> "Plaintiff Fincher did not appear to the court to be a boating enthusiast. Plaintiff Golden testified at length about his boating skills and unequivocally asserted that the only reason the Club denied him membership is because he is Jewish; the court does not share Mr. Golden's conclusion." 370 F.Supp., at 1043.

From this it could be inferred that Mr. Fincher was not a very appropriate candidate for membership in a yacht club and that Mr. Golden was not denied membership on account of his religion. The Court nowhere specifically found as a fact that either was rejected on account of race or religion. It did say that their inability to get a recommendation amounted to a rejection and thus gave them standing to challenge the membership policies of the club. It did not expressly find as a fact that their inability to get a recommendation was caused by reasons of race or religion. That the Court thought so reasonably appears, however, from the opinion, considered as a whole. It may be that the standing of Fincher and Golden was too thin. See, e.g., Rizzo v. Goode [1976, 44 U.S.L.W. 4095] ____ U.S.

____, 96 S.Ct. 598, 46 L.Ed.2d 561. We have concluded, however, not to allow this point to decide the disposition of the appeal.

The dissenting opinion emphasizes that the Miami ordinances "became a part of this and other similar leases by the City of public property". The ordinances repeatedly refer to "facilities", and nothing else. Query: Is a bay bottom a facility? We indicate no opinion on the subject because, in the posture of this appeal, we regard the applicability of the ordinances as not before us for review and thus immaterial.

In like manner, we attribute no significance to Golden's failure, all the way through the Florida Court of Appeals, to secure an adjudication that the ordinances do apply to bay bottom land. Possibly, he chose the wrong procedure or sought the wrong relief. As to this the record is silent and such blind spots are not to be illuminated by appellate guess work.

Our decision is founded on the case made by the parties and decided by the District Court. That Court found as a fact that the existence of the lease was the sole nexus between the City of Miami and the Biscayne Bay Yacht Club. The Court further held that this, alone, amounted to significant state involvement with the club and its membership policies.

For all the reasons hereinabove articulated, we must disagree.

The judgment of the District Court is reversed and the cause remanded with directions to dismiss the complaint.

REVERSED and REMANDED with Directions.

JOHN R. BROWN, Chief Judge, with whom WISDOM, GOLDBERG, GODBOLD and CLARK, Circuit Judges, join (dissenting):

I respectfully dissent for I cannot place my imprimatur on a decision which fails to perceive the realities of the racial and religious discrimination presented by the facts of this case, which implicitly if not explicitly emasculates prior Fifth Circuit cases, which I believe were rightly decided, and which cannot be squared with controlling Supreme Court precedent.

Part I

My position is reflected by all that I said in my opinion for the Court 521 F.2d 344, when this case was originally considered and which I readopt.

In this opinion I referred numerous times to the test of significant state involvement. I think that is a proper test. Judge Coleman makes the point in his dissent, carried [illegible]ward into his opinion for the en banc court, that any lease is "significant state involvement." The answer to this is, of course, that our concern is with legally significant involvement and not with involvement in a sine qua non sense. Whether involvement in the "but for" sense is of sufficient legal significance requires case by case analysis.

Part II

At the outset as we get underweigh from the starting bouy in assaying the Court's en banc opinion, several things should be gotten out of the way. First, the Court, with expected candor, assumes at least arguendo that Golden,

the Jew, and Fincher, the Black, have standing to challenge the racial-religious discrimination practices of BBYC.[1]

Second, and even more important, the Court recognizes[2] that the District Judge found racial-religious discrimination in the membership policies of the Club, as indeed it had to in the face of the findings and conclusions of the District Judge which are above the Plimsoll line of F.R.Civ.P. 52(a) and which were clearly mandated both by the testimony of the officers of BBYC[3] and its By-

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[1]The Court states:

"It may be that the standing of Fincher and Golden was too thin. See, e.g., Rizzo v. Goode [1976, 44 U.S.L.W. 4095] — U.S. —, 96 S.Ct. 598, 46 L.Ed.2d 561. We have concluded, however, not to allow this point to decide the disposition of the appeal.

530 F.2d page 23.

[2]The Court states:

"The [District] Court nowhere specifically found as a fact that either [Golden or Fincher] was rejected on account of race or religion. It did say that their inability to get a recor[illegible]ndation amounted to a rejection and thus gave them standing to challenge the membership policies of the club. It did not express the findings of] fact that their inability to get a recommendation was caused by reasons of race or religion. That the Court thought so reasonably appears, however, from the opinion, considered as a whole."

530 F.2d page 23.

[3]The Judge stated:

With these [demographic] figures in mind, it taxes credulity that the defendant Club can state without reservation that it practices no discrimination and yet, at the same time, is unable to state whether it has ever had a Black or Jewish member in its eighty six years of operation. 370 F.Supp. at 1043. The court concludes that plaintiffs have not been afforded the same rights to membership as their White and Christian counterparts. Id. The facially neutral policy before the court is the sponsorship method of membership in the Biscayne Bay Yacht Club. While the sponsorship requirement is applicable to Black and White and Jew and Christian alike, in a club whose members from inception have been only White and Christian, the effect of the sponsorship requirement is to deny Blacks and Jews any meaningful opportunity for membership. (Citations omitted). Id.

Laws[4] which did not recognize the right of any person Black, White, Christian, Jew or Moslem to "apply" for membership. They restricted processing of prospective memberships to 3 sponsors who could extend an "invitation" when, and only when, the eightman membership

[4]The By-Laws in pertinent part provide:

ARTICLE VI

ELECTION OF MEMBERS

Sec. 1. INVITATION TO MEMBERSHIP. Membership as to all classes of members except Life, Ex-officio, and Juniors qualified to transfer subject to Article V, Section 6, shall be attained by the following procedure:

A. A candidate for membership shall have three sponsors who shall file with the Secretary letters by each of them concerning his or her qualifications therefor, to go with a form to be furnished by the Secretary to the sponsors upon application for the same, whereon detailed data concerning the candidate will be set forth and signed by each of the sponsors.

B. Promptly upon receipt of the form and accompanying letters of the sponsors, the Secretary shall send out a notice to all Senior and Life members giving:

1. The name of the candidate.
2. His or her sponsors.
3. The date upon which the Membership Committee will next meet to consider all candidates.

C. Any Senior or Life member wishing to express his views concerning a candidate may so do in writing (to be held strictly confidential] by delivering his letter to the Secretary prior to the next Membership Committee meeting, or he may appear in person before such committee and present his views. Immediately following final action by the Membership Committee regarding any candidate, the Secretary shall destroy all letters received regarding such candidate, with the exception of the letters of the sponsors, which shall remain in the file of the Secretary.

D. The Board of Governors, acting as a membership committee, shall after due investigation vote by secret ballot on each candidate, but until at least thirty (30) days have elapsed after notice has been mailed by the Secretary to the Senior and Life members with respect to such candidate. The board shall not sit as such membership committee unless at least eight members are present, and no invitation to membership shall be extended if as many as three members of said committee shall vote unfavorably on the candidate. If the Membership Committee fails to approve a candidate after such secret ballot, he or she shall not be eligible to be considered again until the expiration of twelve months from the date of such disapproval.

E. If the Membership Committee approves a candidate for invitation to membership, the Secretary shall advise the sponsors and then, and not until then, may the sponsors extend the invitation to the candidate, and they shall report to the Secretary whether the invitation has been accepted; and if accepted, the Secretary shall confirm to the candidate the invitation and acceptance, and the membership of the club shall be advised thereof in the next monthly notice.

committee had approved the candidate under a structure which made the three-man blackball pennant a final rejection after which virtually all of the supporting materials were to be destroyed.

Thus we are faced squarely with the problem of whether, in the operation of BBYC and its essential dependence on its mooring docks which rest not only on the bay bottom but are bottomed on the essential lease from the city, there is sufficient state involvement under § 1983.

The majority court, misled perhaps by the trial court's conclusion (No. 4) that there was no "evidence . . . before the court that defendant City of Miami was aware of the discrimination practiced by" BBYC, 370 F.Supp. at 1044, made as a prefatory remark to denial of relief against the Mayor and City Commissioners,[5] gives the impression that

[5]The Court states:

No evidence being before the court that defendant City of Miami was aware of the discrimination practiced by the Biscayne Bay Yacht Club which would require the City to terminate its lease, and assuming that defendant Biscayne Bay Yacht Club will comply with the court's Order and immediately cease its discriminatory practices, no relief is appropriate against defendant mayor, or commissioners. 370 F.Supp at 1044.

all of this was a great big shock to the City of Miami and its was completely innocent of what was going on or, more significantly, what was said was going on in terms of violation of peoples constitutional rights.[6]

But this is far from correct. Although it must readily be conceded that at the time of the initial 1962 lease the City had no record-established awareness of the membership policies of BBYC or even an awareness, cf. Wood v. Strickland, 1975, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214; Scheuer v. Rhodes, 1974, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 that § 1983 would be judicially orbited to its current apogee, much water has gone over the dam in the intervening years to bring this sharply to the consciousness of the City Fathers. Indeed, at that very time, the City was acutely aware of the limitations to public use imposed by the 1949 deed from the Internal Improvement Fund, State of Florida.[7]

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[6]No appeal was taken from this part of the order so we are not faced here with the problem of the scope and nature of relief available against erring municipal officials, either in their personal or official capacities, as "persons" under § 1983 on which the Court en banc has recently ruled. See Muzquiz v. City of San Antonio, 5 Cir., February 27, 1976, 528 F.2d 926 (en banc), original panel opinion 520 F.2d 993; Warner v. Board of Trustees of the Police Pension Fund Of The City of New Orleans et al, 5 Cir., February 27, 1976, 528 F.2d 505, original panel opinion 522 F.2d 1384.

[7]The Deed from the Internal Improvement Fund to the City of Miami (Plf. Ex. 11) states:

> PROVIDED, HOWEVER, anything herein to the contrary notwithstanding this deed is given and granted upon the further express condition subsequent that the Grantee herein or its successors and assigns shall never sell or convey or lease the above described land or any part thereof to any private person, firm or corporation for any private use or purpose, it being the intention of this restriction that the said lands shall be used solely for public purposes, including municipal purposes and not otherwise.
>
> PROVIDED, FURTHER, anything herein to the contrary notwithstanding, this deed is given and granted upon the further express condition subsequent that the Grantee herein or its successors or assigns shall not give or grant any license or permit to any private person, firm or corporation to construct or make by any means, any islands, fills, embankments, structures, buildings or other similar things within or upon the above described lands or any part thereof for any private use or purpose, as distinguished from any public or municipal use or purpose. (emphasis supplied).

Because the 1962 lease was expressly subject to these conditions, the parties sought and obtained from the Trustees of the IIF a release of the restriction in the 1949 deed "limiting the use of the lands conveyed therein to municipal purposes". In the waiver IIF found that such "improvements will help relieve the acute shortage of public dock facilities existing in the City of Miami." The waiver was effective during the life of the lease but to "terminate and cease to be effective upon cancellation or termination of the lease". The waiver, however was subject to specific conditions which, if not then readily recognizable as significant, became so by the events of 1968 and the renewal of the lease in 1970.[8]

Now enters Golden, the persistent, tenacious advocate for the obliteration of the last vestiges of state ordained racial or religious discrimination. Through his appearances

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[8]Provided, however, that this Waiver is executed to the following conditions:

(1) The City Commission retains the authority to cancel said lease agreement in the event any development would occur in the operation by the lessee of the leased premises which is inimical to the general public interest.

(2) That the City Commission of the City of Miami retains the authority to cancel said lease agreement in the event of a need for the leased lands for public purposes other than the municipal purposes found herein.
(emphasis supplied)

before agencies of the city, if not the City Commission itself, Golden took a major role in drafting the ordinances[9] designed to prevent racial and religious discrimination which by their terms became a part of this and other similar leases by the City of public property.

By the ordinance adopted 13 June 1968 (amended with no significant changes as to this case July 11, 1968) the City in language which would do credit to a Bicentennial constitutionalist declaring in the prefatory whereas preamble the necessity "that all of its residents be afforded equal opportunity and protection under the Constitution and Laws of this nation" and reaffirming its policy to "properly protect all of its citizens regardless of race, creed, religion, color or national origin, in their basic constitutional rights", adopted a far reaching but highly specific act ordaining in Section 1 that the lessee of any property by the City will not discriminate against or "shall not discriminate against or refuse or deny to any person or persons, guests or permittees, the use of facilities leased from the city because of race, creed, religion, color or national origin". The ordinance then set up a detailed code opening up any such lessee club or organization to all persons without discrimination and prescribing the conditions and requirements for the operation of such lessees in their membership policies and practices. Of unusual importance was the statutory declaration (Section 3) that the ordinance "being a implementation of the provisions of the Constitution of the United States of America . . ., said provisions are to be considered a part of every such lease as described . . . re-

[9]Acting perhaps as a sealawyer, Golden did the original drafts of these ordinances but the final drafts were prepared by the City Attorney's office. R. at 28, 35.

gardless of the specific written terms of any lease now existing or to be entered into in the future".[10]

[10]Section 1. That the lessee of any property of which the City of Miami is the owner shall not discriminate against or refuse or deny to any person or persons, guests or permittees, the use of the facilities leased from the City because of race, creed, religion, color or national origin.

Section 2. That in order to facilitate the implementation of the policy of the City of Miami as set forth in Section 1, in instances wherein leases are entered into between the City of Miami and organizations or clubs for the use of City property or City facilities by the members thereof, said organizations or clubs shall comply with the following requirements:

A. Membership—

I. Membership in the said club or organization shall be available to all persons without discrimination as defined in Section 1 hereof.

II. There shall be no requirement that applicants for enrollment be sponsored by anyone as a condition to such applicant being processed or accepted for membership.

*III. The club or organization shall make a minimum of five per cent of existing enrollment of the various types of membership in such club or organization available for new enrollment for a minimum period of thirty days of each year, the first such enrollment period to commence September 1, 1968. In the year 1969 the enrollment period shall commence July 1st of each year thereafter. In the event there is more than one type of membership available, this shall mean five per cent of each type of membership shall be open to the general public.

IV. Acceptance into membership shall be determined by simply majority vote of the general membership at a meeting designated for such purpose, and there shall be no secret ballot for admission to membership

V. In the event there are a greater number of applicants than there are openings available for membership under the annual five per cent of enrollments as set forth above, then, and in that event, new members in this enrollment period shall be selected by lot.

*VI. Within the thirty day period prior to the date of the commencement of the enrollment period described above (subsection III), the club or organization shall advertise twice in two daily newspapers of general circulation published in the City of Miami a notice of the acceptance of new members as hereinabove provided, and notice of the purposes of the club or organization and of the programs offered by the club or organization to the

But Golden did not rest upon his oars. Convinced that these ordinances were not being complied with by BBYC

public. Said notice for the year 1968 shall be printed on the first and fourteenth days of August. For the year 1969 the notice shall be printed on the first and fourteenth days of June, and on the first and fourteenth days of June of each year thereafter.

B. Dues—All members in each of the various categories of membership shall pay equal dues, if any, within said categories . . .

C. Minutes of Meetings—All minutes of meetings, whether regular meetings or special meetings, or however designated, of said club or organization shall be posted upon the bulletin board upon the club premises within thirty days after the date of such meetings, and a copy thereof shall be forwarded to the City Manager of the City of Miami, or his designee.

D. Privileges—All members in each category shall have equal rights and privileges.

Section 3. The foregoing matters as set forth in Section 1 and 2 above being an implementation of the provisions of the Constitution of the United States of America and the Constitution of the State of Florida, said provisions are to be considered a part of every such lease as described above entered into between the City of Miami and any person, firm, corporation, club or organization, regardless of the specific written terms of any lease now existing or to be entered into in the future.

Section 4. That any person, firm, corporation, club or organization violating the terms and conditions of this ordinance shall be subject to having its lease forthwith terminated by the City of Miami for said violation, upon due notice to the violator and upon an opportunity to be heard before the Commission of the City of Miami concerning said violation.

Section 5. That all ordinances, code sections or parts thereof in conflict herewith, insofar as they are in conflict, are hereby repealed.

Section 6. If any section, sentence, clause, phrase or word of this ordinance is for any reason held or declared to be unconstitutional, inoperative or void, such holding or invalidity shall not affect the remaining portions of this ordinance; and it shall be construed to have been the intent of the Commission of the City of Miami to pass this ordinance without such unconstitutional, invalid or inoperative part therein; and the remainder of this ordinance, after the exclusion of such part or parts, shall be deemed and held to be valid as if such parts had not been included herein.

Section 7. This ordinance is hereby declared to be an emergency measure upon the ground of urgent public need for the preservation of peace, health, safety and property in the City of Miami, and the requirement of reading this ordinance on two separate days is hereby dispensed with by a vote of not less than four-fifths of the members of the City Commission.

*The sections of Ordinance 7668 which are asterisked appear as amended by Ordinance 7682 which was adopted July 11, 1968. In addition to amending the two sections of 7668 indicated above, Ordinance 7682 includes the following pertinent section:

Section 6. This ordinance is hereby declared to be an emergency measure upon the ground of urgent public need for the preservation of peace, health, safety and property in the City of Miami, and the requirement of reading this ordinance on two separate days is hereby dispensed with by a vote of not less than four-fifths of the members of the City Commission.

he began a long, and at least at this point, unsuccessful battle to vindicate these rights. Before taking formal action, Golden informed the City Attorney of the ordinance violations by the club by letter to which there was no reply.[11] Thereafter he appeared before the City Commission with no success.[12]

In the meantime BBYC sought and on March 6, 1970 obtained an amendment to the 1962 lease for approximately one additional acre of adjacent land to "permit construction of additional concrete dock and timber mooring piles . . . being an extension of the existing dock. . . ." The amendment was expressly made subject to the restrictions imposed by IIF in the 1962 waiver (see note 8 supra)[13]. Again, IIF granted a waiver on the same prescribed conditions.

Despairing of his failure in the municipal-legislative approach and presumably unwilling to see his constitutional craft strand on municipal inaction Golden filed in April of 1970 a petition for writ of mandamus in the state Circuit Court of Dade County against the City of Miami. In it he

[11]R. at 36-37.

[12]R. 27-28.

[13]These became conditions 1 and 2.

asserted under oath his failure to obtain admission to BBYC because of the procedure requiring 3 sponsors (see Note 4 supra and accompanying text). He then set forth the specific requirement of the July 1968 ordinance (see Note 10 supra) requiring lessee clubs to admit new members one month of the year without requirement of sponsorship and the fact that BBYC has failed to comply with the ordinance and the City has failed to invoke the penalty despite demand and personal appearance by Golden before the City Commission. He sought cancellation of the lease as the ordinance provides. The prayer was for an "Alternative Writ of Mandamus requiring the Respondent [the city] to enforce the above mentioned ordinance and to require [BBYC] to comply with the said ordinance or to show cause . . . why it should not enforce" the ordinance. The City responded by motion to quash and on September 15, 1970 Circuit Judge Cullen by an unilluminating order granted the motion to quash but, of great importance, expressly prescribed that it was "without prejudice to bring such appropriate action as may be available to petitioner". Presumably unwilling to run any risk of exhaustion of remedy as a prelude to a § 1983 suit as an "appropriate action" Golden then appealed to the District Court of Appeals which affirmed without opinion.

Came then the instant § 1983 suit in February 1974, 6 years after Golden, as Mordecai at the gate, had initiated his lamentation and helped lobby the enactment of the ordinance, 4 years after the execution of an amendatory lease, and 2 years after the City had positive notice through the mandamus proceeding that BBYC, as lessee, was engaging in claimed denial of membership on the basis of race and religion.[14]

This continuation of the relationship between the City and BBYC—whether by formal extension of the lease or acquiescence in its continued enjoyment—in the light of the charge and now judicially credited fact of racial-religious discrimination demonstrates that this is state action whether viewed as Moose Lodge,[15] Burton, or an amalgam of them with Gilmore. Whatever its motive—and this is irrelevant in § 1983—the City has inescapably insinuated itself into the continued availability of an essential facility which it knows now is operated to exclude nonmembers, which is to say Jews and Blacks. See Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 725, 81 S.Ct. 856, 862, 6 L.Ed.2d 45, 52. There is thus a confluence of state participation in the relationship and state participation in the discrimination itself. See New York Jaycees, Inc. v. United States Jaycees, Inc., 2 Cir., 1975, 512 F.2d 856, 858 citing, Powe v. Miles, 2 Cir., 1968, 407 F.2d 73, 81; Jackson v. Metropolitan Edison Co., 1974, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477.

Although motive may be irrelevant to § 1983 liability, the interplay of city and club purposes in this case has a significant impact on the result of the assay for Burton synergism. Indeed, the enhancement of causes and effects

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[14]The District Court noted "that the City has adopted a resolution deferring any extension of the lease with the Club pending this decision." [370 F.Supp. at 1044] (See Plf. Ex. 12, R. 63)

[15]What Moose Lodge involved was the right of guests, not those seeking membership, 407 U.S. at 170-71, 92 S.Ct. at 1970, 32 L.Ed.2d at 636 a significant difference from those claiming the right to compete for membership for use of facilities which could not exist without the City lease.

which take place here orbit about BBYC's racial and religious discrimination. The consideration passing to the city for granting the club the exclusive use of this segment of scarce bay bottom space is not the token $1 per year. It is the assurance that BBYC's white non-Jewish members will be able to moor their yachts at docks on this state-owned land instead of at an overcrowded public pier. For its part, BBYC attorns its annual $1 because it needs this public bay bottom like a dead man needs a coffin. Without this public property it may continue to be a club, but it certainly will not continue to be a yacht club.

Part III

Of course this case presents in stark form the anomaly of there being significant state action through the municipality while the municipality (and perhaps its animate functionaries, see note 10 supra) has effective immunity as a non "person" under § 1983. City of Kenosha v. Bruno, 1973, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109. See also Moor v. County of Alameda, 1973, 411 U.S. 693, 95 S.Ct. 1785, 36 L.Ed.2d 596; Monroe v. Pape, 1961, 365 U.S. 167, 188-93; 81 S.Ct. 473, 484-87, 5 L.Ed.2d 492, 505-07. But nonetheless the ordinance (note 10 supra) is of unusual significance. Its incorporative provision (Section 3) means that the terms of the ordinance are read into the lease. The ordinance imposed burdens both on the city, as lessor, and the lessee, BBYC. Each was subject to the stringent mandates against racial and religious discrimination and the means adopted by the legislative body as a reasonable way by which to achieve the mutually adopted goals.

Under the structure of the ordinance and lease made under and subject to it, the lessee was burdened down with

all of the prohibitory and affirmative mandates, except possibly the obligation or responsibility of initiating criminal prosecutions or overseeing the exaction of such penalties.

Of course, enforcement of city policy, reflected by its unchallenged ordinances is the very essence of municipal government. Under the construct of the ordinance (and the lease) substantial responsibility for compliance fell directly on the lessee. The situation is, of course, not a complete parallel, but as the Supreme Court has recently said in Jackson v. Metropolitan Edison Company:

> We have of course found state action present in the exercise by private entity of powers traditionally exclusively reserved to the State. 1974, 419 U.S. 345, 353, 95 S.Ct. 449, 454, 42 L.Ed.2d 477, 485 citing, Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458 (1932) (election); Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (election); Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (company town); Evans v. Newton, 382 U.S. 296, 88 S.Ct. 486, 15 L.Ed.2d 373 (1966) (municipal park).

We have long ago applied such principles in race civil rights cases.

Indeed, the State of Florida laid this down in the initial conditions it imposed, see note 8 supra, which required that the lease be terminated if operations under it become "inimical to the general public interest." The city and BBYC having expressly covenanted to a policy of non-

racial-religious discrimination and the institution of a club-organization structured to achieve this equality became equally bound in the eyes of the law either to (i) correct the asserted deficiencies or (ii) terminate the arrangement. The fact—now undisputed—is that the city turned both an advocate and deaf ear to these repeated complaints—now judicially credited—which makes Baldwin v. Morgan, 5 Cir., 1958, 251 F.2d 780, 788 directly applicable. We said:

> State action is indeed required under the Fourteenth Amendment and 42 U.S.C.A. § 1983. But those who directly assist the admitted state agency in carrying out the unlawful action become a part of it and subject to the sanction of Section 1983.

In holding the club responsible, I go beyond ordinary principles of agency or landlord-tenant. Rather with the sweep of § 1983 and the aims of that legislation it rests upon the necessity of preventing persons from hiding behind private discrimination which is not reachable by the Constitution when from mutually interacting conduct the resulting enterprise is infected by significant governmental action.

Of course a municipality may engage in conduct which amounts to state action even though under Kenosha there is practical immunity as a non-person. But those animate persons who are engaged in significant parts of such activity and who reap the benefits of it are amenable under § 1983 for appropriate relief.[16] The amenability of a private party under § 1983 for conduct which is significantly attributable to government is not based on an imputed

[16]As to "appropriate" relief see Note 6 supra.

principle of agency or the like but on the ground that, as § 1983 itself says, "Every person" shall be liable to the injured party. Thus that liability is not confined to some governmental official, but frequently is imposed against, for example, operators of retail stores, restaurants, hotels, buses and the like.[17]

Of course in the ordinary situation the liability of private persons flows from the unconstitutional municipal ordinance or practice in certain discriminatory actions. Here, unlike an ordinance which imposes an unconstitutional burden upon someone in the private community, this ordinance imposes a continuing burden on both the City as lessor and the BBYC as lessee to carry out the mandate of non-discrimination. Without suggesting that as a universal matter failure to enforce constitutes sufficient state action, we have already decided that failure on the part of municipality to take action where needed constitutes state action. In Jennings v. Patterson, 5 Cir., 1974, 488 F.2d 436, private individuals erected a barricade across a street, which was publicly owned and the City refused to remove the barricade. Judge Roney in writing the opinion of the majority related this nonfeasance concept to § 1983 and his words are particularly persuasive:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in

[17]Adickes v. S. H. Kress & Co., 1970, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142; Goodloe v. Davis, 5 Cir., 1975, 514 F.2d 1274; Cason v. City of Jacksonville, 5 Cir., 1974, 497 F.2d 949, 950; Jennings v. Patterson, 5 Cir., 1974, 488 F.2d 436, 438; Hall v. Garson, 5 Cir., 1970, 430 F.2d 430, 442-43; Baldwin v. Morgan, 5 Cir., 1958, 251 F.2d 780, 787; Derrington v. Plummer, 5 Cir., 1956, 240 F.2d 922, cert. denied, 353 U.S. 924, 77 S.Ct. 680, 1 L.Ed.2d 719; Browder v. Gayle, M.D.Ala., 1956, 142 F.Supp. 707, aff'd, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114.

> federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies" Monroe v. Pape, 365 U.S. 167, 180, 81 S.Ct. 473, 480, 5 L.Ed.2d 492, 501. Accordingly, we hold that the failure of the City and its governing officials to dismantle the fence constitutes state action proscribed by Section 1983. (emphasis supplied).

See also Azar v. Conley, 6 Cir., 1972, 456 F.2d 1382, 1387: Ingram v. Dunn, N.D.Ga., 1974, 383 F.Supp. 1043, affirmed, 514 F.2d 1070; Minshew v. Smith, N.D.Miss., 1974, 380 F.Supp. 918, 922; cf. Civil Rights Cases, supra; Bell v. Maryland, 1964, 378 U.S. 226, 309-11, 84 S.Ct. 1814, 1859-1860, 12 L.Ed.2d 822, 845-846.

Although the barrier which blocks these parties access to the Biscayne Bay Yacht Club may be less physically[18] evident than in Jennings it is nevertheless there as well as the racial and religious animus which it represents. And the City's failure to remove it clearly constitutes complicity in the enterprise of sufficient magnitude to satisfy even the most conservative state action standards.

Likewise, the extension of the lease or the continuation of the enjoyment of it in the face of now judicially estab-

[18]It may be not less, but more. Access to the driveway leading into the club's landbased grounds is not what made BBYC a great nautical organization. For a club which has long-established races such as the Sir Thomas Lipton Challenge Cup Race, The Miami-Montego Bay Race, the St. Petersburg-Venice Lauderdale Race, the notion that the club could be land-locked without mooring facilities would be a disservice to the memory of the pre § 1983 ambitions of Commodore Munroe.

lished discrimination, quite without regard to affirmative cancellation by the City, made the BBYC a participant in the discrimination.

Part IV

It is as though the city in its contract had expressly recited that it leased the property to BBYC, an exclusively White non-jewish organization, for the exclusive use of its members and guests. Gilmore v. City of Montgomery, 1974, 417 U.S. 556, 566, 94 S.Ct. 2416, 2422, 41 L.Ed.2d 304, 315-17.

Gilmore clearly proscribes the exclusive use of public property by racially discriminatory organizations. The primary consideration should be whether this Court is willing to condone the State's participation in, and approval of, racial discrimination by allowing public property to be utilized in this enterprise.[19]

In Gilmore the Supreme Court emphasized that the city policies permitting exclusive use of city facilities by segregated schools operated to contravene an existing school desegregation order, just as the discrimination in this case violated the clear mandate of the ordinance-lease. Gilmore, supra 417 U.S. at 568, 94 S.Ct. at 2423, 41 L.Ed.

[19]Mr. Justice Blackmun writing for the majority explained the exclusive use concept as follows:

> Here, the exclusive use and control of city recreational facilities, however temporary, by private segregated schools was little different from the city's agreement with the YMCA to run a "coordinated" but, in effect, segregated recreational program. Such use and control carried the brand of "separate but equal" and, in the circumstances of this case, was properly terminated by the District Court.
> 417 U.S. at 567, 94 S.Ct. at 2423, 41 L.Ed.2d at 316.

2d at 316. The Court noted that "the city's officials were aware of this [desegregation] order and were responsible for seeing that no actions on their part would significantly impede the progress [of desegregation] . . . ." Id. In Golden the city's lease with BBYC, and its refusal to recognize the Club's restrictive membership, operates to contravene the city's own antidiscrimination ordinances. The City of Miami officials were aware of the policy expressed by the ordinance and had a duty to take no action, such as leasing city property—or now more important, the extension of the lease—that would contravene the requirement that all city lands be used in a non-discriminatory manner.

Gilmore does not state that a segregated group can never use public facilities. Rather it emphasizes that such an organization cannot have exclusive use and control of city-owned property. This is what the BBYC lease permits —exclusive use of city property by a racially and religiously restricted group. That this is sufficient to find state action is indicated by Gilmore in that if "the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger . . . ." Gilmore, supra 417 U.S. at 574, 94 S.Ct. at 2426, 41 L.Ed.2d at 320.

Part V

Today the Court opens the door to subterfuge because well within the bounds of this opinion, a governmental entity may accomplish indirectly what it could never do directly by leasing public property to a private segregated organization and then disavowing any direct participation in the discriminatory membership policies.

This sort of subtle method of effectuating racial and religious discrimination has been specifically rejected by the Supreme Court in Gilmore and by this Court in Wimbish v. Pinellas County, Florida, 5 Cir., 1965, 342 F.2d 804 and Derrington v. Plummer, 5 Cir., 1956, 240 F.2d 922, cert. denied, 353 U.S. 924, 77 S.Ct. 682, 1 L.Ed.2d 719, where we refused to allow public property to be leased to segregated organizations.

Part VI

The court's response to its own question why the District Court did not cancel the "offending appendage and simply enjoin the use of the docks"[20] was, that it was probably influenced by the practical result that docks cut loose would be useless. That answer ignores the whole record. The docks are an integral part of a yacht club if it is not one in name only. Because they are indispensable to the operation of a yacht club worthy of the nautical traditions of this organization and they do not exist without the essential governmental lease, the plaintiffs seek not just to tie up at the docks, but to moor their vessels at the dock as a part of the yacht club and thereby enjoy all the privileges of membership until such time as the State cuts itself altogether free from the enterprises.

The Court's argument that there were other docking facilities, both public and private on Biscayne Bay, available to plaintiffs is not an acceptable one in assaying denial for proscribed reasons. As to use of facilities which cannot operationally exist without State action, the same

[20]See 530 pages 21-22, citing Wright v. City of Brighton, 5 Cir., 1971, 441 F.2d 4147; United States v. State of Mississippi, 5 Cir., 1974, 499 F.2d 425.

argument has been made and rejected in the cases of public golf courses, swimming pools, public auditoriums and the enjoyment of segregated seats on a city bus.[21]

Part VII

The majority places emphasis on our recent decision in Greco v. Orange Memorial Hospital Corp., 5 Cir., 1975, 513 F.2d 873 which, of course, also concerned the lease of public land by a private entity.

In writing the opinion for the Court when this case was first considered I distinguished Greco on the obvious ground that it did not involve racial discrimination which is a realm of law where courts have consistently and readily found state action. See Golden v. Biscayne Bay Yacht Club, supra, at 326-29.

But Greco is also distinguishable on its facts for there the Court stressed that the lease from the city had not included any condition relating to the performance or non-performance of elective abortions.[22] In contract, both the

[21]Beal v. Holcombe, 5 Cir., 1951, 193 F.2d 384, cert denied, 1954, 347 U.S. 974, 74 S.Ct. 783, 98 L.Ed. 1114 (golf course); St. Petersburg v. Alsup, 1956, 238 F.2d 830, cert. denied, 1957, 353 U.S. 922, 77 S.Ct. 680, 1 L.Ed.2d 719 (swimming pool); Bynum v. Schiro, E.D.La., 1963, 219 F.Supp. 204, 209, aff'd, 375 U.S. 395, 84 S.Ct. 452, 11 L.Ed.2d 412 (municipal auditorium); Browder v. Gayle, supra at 717 (city bus); New Orleans City Park Improvement Association, 5 Cir., 1958, 252 F.2d 122, 123 (city park facilities).

[22]The Court stated that:

> There is no evidence that in acquiring federal funds or in leasing the hospital facility the corporation ever accepted a condition relating to the performance or non-performance of abortions. Doe v. Bellin Memorial Hospital, 479 F.2d 756, 761 (7th Cir. 1973). The Parking Authority in Burton, on the other hand, was specifically obligated to operate in a non-discriminatory manner.

BBYC lease by way of city ordinances incorporated therein, (see note 10 supra) and Burton had specific provisions barring racial discrimination, and at the very least the club had a duty to perform its obligations in accordance with the terms of the lease.

Part VIII

In wrapping this up some additional comments are appropriate. We understand the majority opinion to hold that the fact that a private club leases some of the property it uses from a governmental entity is not enough in itself to imbue the private club's discriminatory activities with "state action." Whatever the validity of that holding as a legal proposition, we are convinced that the result reached by the majority is incorrect, because several unique factors relating to this particular lease were not properly taken into account in the majority opinion.

The panel opinion, 521 F.2d 344, as does this dissent, discussed these special considerations which mandate the conclusion that "much more is involved than simple ownership and lease" 521 F.2d at 352. This was a lease of water-bottom land abutting very valuable property—we can take judicial notice that this lease was worth considerably more than $1.00, and thus that the financial accommodation here had the same effect as would a fair market value lease combined with a large subsidy given from the city to the club. The lease arrangement between the club and the city was grounded, pursuant to a state requirement, on a condition that the club would be performing a "public purpose," viz., providing private dock space which would to some extent relieve the overcrowded public docks. The city at one point had recognized, through ordinance, that as

trustee of a limited and valuable public resource, it had an obligation to insure that any private clubs given exclusive access to parts of that resource would not practice invidious discrimination. The club failed to comply with that ordinance, although the prohibition of invidious discrimination had been made part of the lease, and the city refused to enforce the ordinance, despite clear notice of the violation.

This Court need not decide whether any one of these considerations, standing alone, would be sufficient to support a finding of state action. Rather, we need only pass on whether the cumulation of these considerations develops an image of "significant state involvement." For us, all the facts and circumstances lead to only one conclusion—the cumulation of the various aspects of the city-club relationship colors the club's policies of racial and religious discrimination with state action. The majority has reached a different result by failing to consider all the relevant factors, so today's opinion should not be read to foreclose a finding of state action in similar circumstances in the future. The "no state action" harbor for the Club's white non-jewish yachts is constitutionally unsound, and we would give them no berth.

The District Court should be AFFIRMED.

Harold S. GOLDEN and David Fincher,
Plaintiffs-Appellees,

v.

BISCAYNE BAY YACHT CLUB et al.,
Defendants-Appellants.

No. 74-1349.

United States Court of Appeals,
Fifth Circuit
Sept. 26, 1975.

Rehearing En Banc Granted
Nov. 19, 1975.

Before BROWN, Chief Judge, and COLEMAN and CLARK, Circuit Judges.

JOHN R. BROWN, Chief Judge:

Plaintiffs, Black and Jewish applicants for membership in defendant's private Biscayne Bay Yacht Club brought this action pursuant to 42 U.S.C.A. §§ 1981,[1] 1983[2]

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[1]§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

[2]§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, reg-

and 2000a[3] alleging the Club discriminated on the basis of race and religion in their admission policies. The trial court[4] found a pattern of discrimination had existed and that it was conducted "under color of law" because the Club leased bay bottom land from the city of Miami, Florida regulated by ordinances that expressly prohibited dis-

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ulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
R.S. § 1979.

[3]SUBCHAPTER II.—PUBLIC ACCOMMODATIONS

§ 2000a. Prohibition against discrimination or segregation in places of public accommodation—Equal access

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accomodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Support by State Action

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

Private establishments

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section. Pub.L. 88-352, Title II, § 201, July 2, 1964, 78 Stat. 243.

[4]Golden v. Biscayne Bay Yacht Club, S.D.Fla. 1973, 370 F.Supp. 1038.

crimination for race, religion or national origin[5] upon which to maintain its dock facilities and, such governmental participation constituted sufficient "state action" to bring the discriminatory conduct within the Fourteenth Amendment.[6] Accordingly, the trial court ordered the club to cease the practice of denying persons membership in the Club solely on account of their race or religious affiliations. We agree.

The History

The Club, was organized in 1887 to provide a meeting place for yachtsmen in early Miami. In 1932, the Club purchased its present club house located adjacent to Biscayne Bay. In 1962, the City of Miami asserted ownership to the bay bottom land abutting the Club's property and since that time the Club has leased from the City sufficient bay bottom land to support its docking facilities at an annual rental of $1.00.

The City acquired the bay bottom lands from the Trustees of the Internal Improvement Fund of the State of Florida under deed terms which required that the lands be used for public purposes only. In 1969 it obtained a

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[5]Miami, Fla. Code § 38-9, 1 provides:

The lessee of any property of which the city is the owner shall not discriminate against or refuse or deny to any person or persons, guests or permittees, the use of the facilities leased from the city because of race, creed, religion, color or national origin. (Ord.No. 7668, § 1)

Miami, Fla.Code § 38-9.2, sub. § A. 11 states:

There shall be no requirement that applicants for enrollment be sponsored by anyone as a condition to such applicant being processed or accepted for membership. (Ord.No. 7668, § 2; Ord.No. 7682, §§ 1, 2.)

Miami, Fla.Code § 38-9.3 (Ord.No. 7668, § VI, sub. § 3)

[6]The Fourteenth Amendment of the United States Constitution provides in pertinent part:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

waiver from the trustees for its lease to the Club by asserting that the docks maintained by the Club helped relieve the shortage of public dock facilities in the city. The docks are for the exclusive use of Club members and the general public is prohibited from tying up there or using the decking. But without the bay bottom land the Club could not maintain docking or mooring facilities and accordingly the City's lease of this land is essential to the Club's function, considering that a yacht club is not much of one if members and authorized guests have no means to anchor, moor or tie up their craft.

Membership in the Club is by sponsorship[7] only. The by-laws of the Club provide for invitation to membership by three sponsors (members) consisting of a proposer and two seconders who file with the Club's secretary a letter stating the candidate's qualifications for membership. After investigation by the Club a vote by secret ballot is held by the Board of Governors sitting as the Membership Committee. At least eight members are needed for a quorum and if any three members of the committee veto the candidate, the black ball is run up and no invitation is issued.[8] While the by-laws of the Club do not expressly prohibit membership by members of the Jewish faith or Black race there are no known past or present Jewish or Black members except for one honorary Black member, the Commodore of the Jamaica Yacht Club.

Both Golden and Fincher expressed interest to Club officials in obtaining applications for membership but

[7]See note 10, infra, and accompanying text.

[8]See Golden v. Biscayne Bay Yacht Club, City of Miami, supra, at 1041.

were informed that they would have to be sponsored by a Club member to be eligible for membership. As a result of the Club's refusal to accept plaintiffs' applications they brought suit for declaratory and injunctive relief asserting that the Club's admission procedure was discriminatory on the basis of race and religion and accordingly violated the Fourteenth Amendment and the civil rights statutes.

From a finding by the trial court in favor of the plaintiffs the Club appeals asserting that, (i) the plaintiffs have no standing to challenge the Club's admission policies, (ii) the record fails to support the trial court's conclusion that the plaintiffs were deprived of their constitutional rights, (iii) that the record fails to support the trial court's conclusion that the Club's membership practices were discriminatory on the basis of race or religion, (iv) whether the Club's leasing of city owned land constituted acts under color of law sufficient to create jurisdiction within the satrapy of Title 42 U.S.C.A. § 1983.

Standing

[1] Fundamentally, Article III of the United States Constitution requires that the judicial power of the United States Courts shall extend only to cases or controversies arising under the Constitution, laws, or treaties of the United States. This constitutional requirement has been interpreted by the Supreme Court to mean that the plaintiff must assert that the conduct of the defendant has caused him injury in fact whether economic or otherwise. See Association of Data Processing Service Organizations, Inc. v. Camp, 1970, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184. In the words of Mr. Justice Marshall in Jenkins v.

McKeithen, 1969, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404, "[t]he indispensable requirement is, of course, that the party seeking relief allege 'such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult contitutional questions.'" Id. at 423, 89 S.Ct. at 1849. Citing, Baker v. Carr, 1962, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663; Flast v. Cohen, 1968, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947; Joint Anti-Fascist Refugee Committee v. McGrath, 1951, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817. See also Evers v. Dwyer, 1958, 358 U.S. 202, 79 S.Ct. 178, 3 L.Ed.2d 222.

[2, 3] In the case at hand the District Court specifically found that the plaintiffs had a personal stake in the outcome of the litigation. The existing membership policies they attacked as exhibiting a pattern of discrimination formed the standards upon which the Club refused to accept plaintiffs' applications. More specifically, it is unquestionable that standing may be based upon an interest created by the Constitution or a statute. See Parker v. Fleming, 1947, 329 U.S. 531, 67 S.Ct. 463, 91 L.Ed. 479; Coleman v. Miller, 1939, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385. Here is involved a claim of racial and religious discrimination which seems clearly to fall within the "zone of interest" of the statutory language of 42 U.S.C.A. § 1983.[9] Thus, we reject out of hand the defendant's contention that the plaintiffs possess insufficient standing to assail the membership policies of the Club.

[9]When a statutory remedy is asserted by the plaintiff Courts consider not only the case or controversy test but also whether the interest sought to be protected by the complainant is within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question. See Tennessee Electric Power Co. v. T.V.A., 1939, 306 U.S. 118, 59 S.Ct. 366, L.Ed. 543.

The Standard

[4] "Two elements must be proved to recover under § 1983(i) a deprivation of a constitutional right by the defendant, and (ii) that the defendant, acted under 'color of law'." See Smith v. Young Men's Christian Association of Montgomery, 5 Cir., 1972, 462 F.2d 634; accord. Adickes v. S. H. Kress & Co., 1970, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142. Because we find that these elements are satisfied and relief is appropriate under § 1983 we deem it unnecessary to reach the question of whether the Club's admission policies also violated § 1981 and Title II of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000a.

Acts of Discrimination

[5] The trial court found that admission policies of the Yacht Club over its long history had fostered a subtle pattern and practice of discrimination evidenced by the total lack of minority representation, save one honorary member who was a citizen of a foreign country. See Golden v. Biscayne Bay Yacht Club, City of Miami, supra, 370 F.Supp. at 1043. Moreover, the Court found that the sponsorship requirement, although not egregious on its face, in practicality operates to exclude Blacks and Jews from Club membership.[10] Id., citing Local 53 of International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler, 5 Cir., 1969, 407 F.2d 1047; Ross v. Dyer, 5 Cir., 1963, 312 F.2d 191.

[10]In Adams v. Miami Benevolent Association, Inc., 5 Cir., 1972, 454 F.2d 1315, 1318. we found that a five vote veto clause in the constitution of an organization functioned as a "Whites only" clause even though the constitution contained no express "Whites only" language. Similarly, in this case the Judge could find the three vote veto feature of the Club's membership procedure was an effective 'Whites only" provision, not to mention the sponsorship requirement which had the effect of perpetuating a membership consisting of persons with similar background, race and religious preferences.

Upon such findings of fact the trial court concluded that the "plaintiffs had not been afforded the same rights to membership as their white and Christian counterparts". See Golden v. Biscayne Bay Yacht Club, City of Miami, supra, 370 F.Supp. at 1043. These findings of racial and religious discrimination are supported by the record and are well above the Plimsoll line of F.R.Civ.P. 52(a). Cook & Nichol, Inc. v. Plimsoll Club, 5 Cir., 1971, 451 F.2d 505.

"Under Color Of Law"—The Basis Upon Which Constitutional Restrictions Are Applied To Private Conduct Entwined With Public Activities

[6-8] We recognize at the outset that the Equal Protection Clause of the Fourteenth Amendment does not prohibit the "[i]ndividual invasion of individual rights." Civil Rights Cases, 1883, 109 U.S. 3, 11, 3 S.Ct. 18, 21, 27 L.Ed. 835, 839. However, it does prohibit state action of every kind that operates to deny any citizen the equal protection of the laws. Id. When private enterprises become sufficiently entwined with Government policy or receive substantial aid and support from governmental entities they are said to be acting "under color of law" and consequently are subject to the Constitutional limitations which prohibit discriminatory conduct by the State. See Gilmore v. City of Montgomery, 1974, 417 U.S. 556, 565, 94 S.Ct. 2416, 41 L.Ed.2d 304; Evans v. Newton, 1966, 382 U.S. 296, 299, 86 S.Ct. 486, 15 L.Ed.2d 373.

This finding is not only sufficient to supply state action, it is also well armored against attack as clearly erroneous. Indeed, it draws additional validity from the type of actionable wrong here involved.

Despite its heavy overlay of law, the "state action" which supplies "color of law" ultimately turns upon resolving questions of fact, a resolution to be reviewed here under the same strictures of Fed.R.Civ.P. 52(a) applied to the trial court's finding of discrimination.

> ". . . the Court has never attempted to formulate 'an infallible test for determining whether the State . . . has become significantly involved in private discriminations' so as to constitute state action. Reitman v. Mulkey, 387 U.S., at 378, 87 S.Ct., at 1632. '"Only by sifting facts and weighing circumstances" [on a case-by-case basis] can the "nonobvious involvement of the State in private conduct be attributed its true significance."' Id., quoting Burton, 365 U.S., at 722, 81 S.Ct., at 860. This is the task for the District Court . . . ."

Gilmore v. City of Montgomery, supra, 417 U.S. at 574, 94 S.Ct. at 2427.

Looking to the trial court's findings as the trier of the fact we find them amply supported by the evidence including uncontradicted circumstances and well grounded in the articulation of factual emphasis and awareness of significant legal precedents.[11]

With respect to racial discrimination the Supreme Court has been unwilling to condone any significant degree

[11]The trier of fact found:

> the City of Miami leases publicly owned land to the defendant Club so that the Club may operate as a yacht club and provide dockage for its members. Here, the court is not faced with "periodic" or incidental use of municipally owned recreational facilities as in the recent case of Gilmore v. City of Montgomery, 473 F.2d 832 (5th Cir. 1973). Rather, the lease under issue is on a permanent basis and, unlike the facilities in Gilmore, cannot be used by anyone other than Club members and their guests.

of state action in discriminatory conduct by private parties. See Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45; accord, Reitman v. Mulkey, 1962, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830. We have but recently taken cognizance of this in Greco v. Orange Memorial Hospital Corp., 5 Cir., 1975, 513 F.2d 873 in which the Court found that there existed no state action in a non-racial discrimination case. There the plaintiff, a physician, had been prohibited from performng elective abortions in a hospital operated by a private charitable corporation but leased from the county, received tax exemptions, and received some federal fund-

Neither is the court faced with the minimal degree of state involvement present in the recent Supreme Court's decision in this area, Moose Lodge No. 197 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1973). In Moose Lodge, the issuance of a liquor license to the discriminating Club was the only nexus with the state. No special benefit by reason of the liquor license was afforded the Club by the state since, like other state furnished services such as police and fire protection, water and electricity the benefits of a liquor license were potentially available to all state citizens. Here, however, the defendant Club enjoys a select privilege not available to each citizen but one coveted by many citizens in the South Florida area. More critically, the privilege is essential to the Club's operation.

The facts of the instant case also differ from the recent decision in Solomon v. The Miami Woman's Club [359 F.Supp. 41 (S.D. Fla. 1973)], in which this court held that the particular state lease to a state headquarters did not contain sufficient state involvement to clothe the patently discriminatory membership policies of the local private club with the color of state law. In Solomon the court was faced with an arms-length lease entered into by a municipality far from the location of the local club. Here, the court is confronted with a lease to defendant of property vital to the operation of a yacht club. Thus, on the facts of this case, the Court holds that the "symbiotic relationship" between the state and the Club exists, thereby making any discriminatory action by the Club a violation of the Fourteenth Amendment. Burton v. Wilmington Parking Authority [365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961)]. By virtue of the lease, the acts of the Club become those of the state and any deprivation of an individual's rights by the Club become a deprivation by the state.

ing. In finding no state action the Court emphasized the distinction[12] between the degree of state action necessary to impose constitutional restraints in cases concerning racial discrimination[13] and the higher degree of state in-

[12]The Court stated that:

The most obvious distinguishing factor is that Orange Memorial Hospital is not accused of racial discrimination. The doctrine of state action developed primarily in the area of racial discrimination. See State-Action Theories of 657 and footnote 10, supra. The concepts developed in this area, explicitly supported by constitutional and legislative mandates, were necessarily broadly drawn in order to implement Congressional intent in circumstances of positive and frequent state obfuscation and delay. The potentially explosive impact of the application of state action concepts designed to ferret out racially discriminatory policies in areas unaffected by racial considerations has led courts to define more precisely the applicability of the state action doctrine. See James v. Pinnix, 495 F.2d 206, 209 (5th Cir. 1974) and footnotes 10, supra. See also Brantley v. Union Bk. & Trust Co., 498 F.2d 365 (5th Cir. 1974); Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956); Blouin v. Loyola, 506 F.2d 20 (5th Cir. 1975); Grafton v. Brooklyn Law School, 478 (F.2d 1137, 1142 (2nd Cir. 1973). Compare, Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed. 2d 659 (1964).

Greco v. Orange Memorial Hospital Corp., supra, at 879.

[13]See e.g., Powe v. Miles, 2 Cir., 1968, 407 F.2d 73, 82 where Judge Friendly refused to label a private school a state actor for purposes of the Due Process Clause but indicated that charges of racial discrimination would subject the school to constitutional restraints. Likewise, in Edwards v. Habid, 1968, 130 U.S. App.D.C. 126, 397 F.2d 687, the Court recognized that arguably private conduct might constitute state action under the Fourteenth Amendment but not for purposes of the First Amendment guarantees of freedom of speech.

Commentators have also recognized this distinction. See Note, State Action: Theories For Applying Constitutional Restrictions To Private Activity, 74 Colum.L.Rev. 656, 657 (1974); Comment, State Action and The Burger Court, 60 Va.L.Rev. 840 (1974). For more general discussions of these concepts see Lewis, The Meaning of State Action 60 Colum.L.Rev. 1083, 1093 (1960); Karst & Horowitz, Reitman v. Mulkey; A Telophase of Substantive Equal Protection, 1967, Sup.Ct. Rev. 39, 55-58 (1967); Williams, The Twilight of State Action, 41 Texas L.Rev. 347, 378 (1963).

volvement which is necessary for private conduct to be subjected to Fourteenth Amendment sanctions when other types of constitutional violations have occurred.[14] The Courts' willingness to find state action more readily in racial discrimination cases is not hard to explain. After all, such discrimination was the very condition that precipitated the enactment of the Fourteenth Amendment.[15]

In cases involving racial discrimination courts have found state action when the nexus between the state and the private activity is far more attenuated than in Greco.[16]

For example in Norwood v. Harrison, supra, the Supreme Court found state action when the Government merely provided free textbooks to students in a private segregated school and prohibited even this slight degree of state assistance unless the schools demonstrated that racial discrimination did not exist.[17]

[14]Lack of state action has been more readily determined by the Courts in areas not involving racial discrimination. See, e.g. Jackson v. Metropolitan Edison Co., 1974, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (no state action found to exist in a suit by a customer of a utility company who asserted the company unconstitutionally terminated his service); Lloyd Corp. v. Tanner, 1972, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (freedom of speech); Male v. Crossroads Associates, 2 Cir., 1972, 469 F.2d 616; McQueen v. Drucker, 1 Cir., 1971, 438 F.2d 781 (non-racial discrimination cases). See also Burke and Reber, State Action, Congressional Power and Creditors' Rights: An Essay On The Fourteenth Amendment, 47 S.Cal.L.Rev. 1 (1973).

[15]See, e.g., Ex Parte Virginia, 1880, 100 U.S. 339, 344-45, 25 L.Ed. 676; Slaughter-House Cases, 1873, 83 U.S. (16 Wall.) 36, 71, 21 L.Ed. 394. See generally Note, State Action: Theories For Applying Constitutional Restrictions To Private Activity, supra, at 657-58; Comment, State Action And The Burger Court, supra, at 846.

[16]See e.g., Pitts v. Department of Revenue, E.D.Wis., 1971, 333 F.Supp. 662, where, in a racial discrimination case the Court found state action in merely granting a tax exemption.

[17]Compare Board of Education v. Allen, 1968, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060, where the Court held that the loaning of textbooks to private school children did not violate the Establishment Clause of the First Amendment.

[9, 10] We believe, in this context,[18] religious discrimination against the Jewish applicant carries the same stigma of inferiority and badge of opprobrium that is characteristic of racial discrimination.[19] Accordingly, we apply the well developed standards utilized in the racial discriminaton setting to both litigants, for the gravity of harm is exactly the same as to both plaintiffs and there exists no rational basis for distinguishing between them by allowing relief as to one while denying it to the other.

The Facts Fit

We do not deal here with a "traditional state monopoly" (such as electricity, water, or fire and police protection) or any "generalized governmental service." See, Gilmore v. City of Montgomery, supra. The city's involvement is both specialized and unique.

[11] It is apparent from the relationship between the City of Miami and the Club that without the City's lease of the bed of the bay the Club could not exist. The very nature of the Club required that there exist dock and mooring facilities for the vessels of its members. No showing was made that the City was compelled to grant the lease. Indeed, the city relied on the Club's operation of dock facilities on the leasehold to supply the degree of "public use" which the state's grant to the city required. So much more is involved than simple ownership and lease.

[18]The infringement upon religious freedom in this case is invidious religious discrimination which is violative of the Equal Protection Clause of the Fourteenth Amendment, as well as the establishment clause and free exercise clause of the First Amendment.

[19]See O'Malley v. Brierley, 3 Cir., 1973, 477 F.2d 785, 795-96; cf., Developments in the Law—Equal Protection, 82 Harv.L.Rev. 1065, 1127 (1969).

The effectuation of the lease required the mutual cooperation of the city and the Club. Aside from the fact that the lease was essential to the Club's function, and the Club's function was essential to this "public use" validity of the lease, the City provided substantial financial aid to the Club by making the bay bottom land available for the token rental of $1.00 per year.[20]

So too this Court has held that the leasing of government owned property to private entities which discriminate on the basis of race, is a sufficient nexus between private and public conduct to establish "state action".[21] See Wimbish v. Pinellas County, Florida, 5 Cir., 1965, 342

[20]On numerous occasions the Supreme Court has expressed its unwillingness to sanction government monetary aid to private entities which discriminate on the basis of race. See, e.g., Cooper v. Aaron, 1958, 358 U.S. 1, 19, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 5 where the Court stated that "[s]tate support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny . . . equal protection of the laws." See also Norwood v. Harrison, supra, (state textbook loan to private schools with discriminatory admissions policies prohibited); accord, Coit v. Green, 1971, 404 U.S. 997, 92 S.Ct. 564. 30 L.Ed.2d 550; Griffin v. County School Board of Prince Edward County, 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256; Burton v. Wilmington Parking Authority, supra. See also, note 21, infra and accompanying text.

[21]Similarly, our Court has refused to condone the sale of public property to private all-white acadamies which discriminate racially. See Wright v. Baker County Board of Education, 5 Cir., 1974, 501 F.2d 131 (Court rescinded the sale by the School Board of an elementary school to white parents for the establishment of a segregated school); United States v. State of Mississippi, 5 Cir., 1974, 499 F.2d 425 (en banc) (sublease of public school facility to private segregated school set aside); McNeal v. Tate County School District, 5 Cir., 1971, 460 F.2d 568 (Court enjoined discriminatory use of old dilapidated school facility sold to all-while school); Wright v. Brighton, 5 Cir., 1971, 441 F.2d 447, cert. denied, 404 U.S. 915, 92 S.Ct. 228, 30 L.Ed.2d 190 (Court enjoined sale or lease of public junior high school to segregated private school).

F.2d 804. This position was emphatically endorsed by Justice White concurring in Gilmore.[22]

The very same activity—exclusive use of public property by private, racially discriminatory entities—which is occurring here was condemned by the Supreme Court in Gilmore. Moreover, this Court's recent decision in Goodloe v. Davis, 5 Cir., 514 F.2d 1274 (1975) established that even nonexclusive use by a private segregated summer baseball league along with some financial support from the city, was a sufficient nexus between Government and private actions to form the basis of a finding of "state action", where the effect was to interfere with the District Court's desegregation order.

[22]Justice White stated that:

> It may be useful also to emphasize that there is very plainly state action of some sort involved in the leasing, rental, or extending the use of scarce city-owned recreation facilities to private schools or other private groups The facilities belong to the city, an arm of the State; the decision to lease or otherwise permit the use of the facilities is deliberately made by the city; and it is fair to assume that those who enter into these transactions on behalf of the city know the nature of the use and the character of the group to whom use is being extended. For Fourteenth Amendment purposes, the question is not whether there is state action, but whether the conceded action by the city, and hence by the State, is such that the State must be deemed to have denied the equal protection of the laws. In other words, by permitting a segregated school or group to use city-owned facilities, has the State furnished such aid to the group's segregated policies or become so involved in them that the State itself may fairly be said to have denied equal protection? Under Burton v. Wilmington Parking Authority, 365 U.S. 715 [81 S.Ct. 856, 6 L.Ed.2d 45] (1961), it is perfectly clear that to violate the Equal Protection Clause the State itself need not make, advise, or authorize the private decision to discriminate that involves the State in the practice of segregation or would appear to do so in the minds of ordinary citizens.

417 U.S. 556, 582, 94 S.Ct. 2429.

Moose Lodge No. 107 v. Irvis, 1972, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627, does not stand in the way.[23] In Moose Lodge petitioners contended that the local Moose Lodge discriminated on the basis of race and that such private conduct was under color of state law because the state issued the lodge a liquor license. However, the Court held that this licensing alone was an insufficient nexus to establish "state action".

In contrast to Moose Lodge the City of Miami-Biscayne Bay Yacht Club is more akin to the lessor-lessee relationship found to constitute state action by the Supreme Court in Burton v. Wilmington Parking Authority, supra. Indeed, the city fostered the Club's continued existence and prosperity by providing a lease essential to the Club's operation and by charging a token fee for the privilege of excluding members of the public from the beneficial use of public property. Surely, without the city's participation the Club could not have existed as a yacht club. It could, of course, become a yacht club in name, landlocked and separated from mooring facilities. But it could not exist as one in fact. Accordingly the city, as the arm of the state, was significantly involved in the private discriminatory activity.[24] Correspondingly, the Yacht Club served the city by maintaining dockage at its

[23]While some commentators read Moose Lodge to indicate some reluctance by the Supreme Court to find "state action" in racially discriminatory private club activity, see, Note, State Action: Theories For Applying Constitutional Restrictions To Private Activity, supra, at 688-89; Comment, State Action and The Burger Court, supra, at 849-50. Gilmore indicates that the Court remains unwilling to condone any significant involvemet by governmental entities in racially discriminatory activity.

[24]The Supreme Court in Gilmore v. City of Montgomery, supra, at 572-74, 94 S.Ct. 2416, distinguished Moose Lodge No. 107 v. Irvis, supra, in a similar way.

private expense which relieved the pressures on the city's crowded dock facilities.

The Judicial Tightrope—Equal Protection versus Freedom of Association

[12, 13] We are cognizant that Courts should minimize the extent to which they infringe upon the individual's First Amendment right to freedom of association. Mr. Justice Douglas, dissenting in Moose Lodge, expressed this well in saying that "[t]he associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established." 407 U.S. at 179-80, 92 S.Ct. at 1974. Nevertheless, that private exercise of freedom of association must function without significant state support and involvement. See Gilmore v. City of Montgomery, supra, 417 U.S. at 575, 94 S.Ct. at 2427. "Invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action". Id. See also Norwood v. Harrison, supra, 413 U.S. at p. 470, 93 S.Ct. 2804.

Affirmed.

COLEMAN, Circuit Judge (dissenting).

Even the half-alert will quickly grasp what this decision means. So far as I know, or can find out, this is the first time in the history of American jurisprudence that a federal court has assumed jurisdiction over the membership policies of a genuinely private club. Since the City of Miami has absolutely nothing to do with the support,

the internal operation, or the membership policies of this private yacht club and since the club performs no public function whatever, this decision means that hereafter in the Fifth Circuit no private club, private individual or collection of private individuals may lease public property for private use and be able thereafter to remain private. If there is a lease there is significant state involvement. The far reaching consequences of this unprecedented action will be discussed in a moment.

Since I remain entirely unconvinced that the Constitution imposes such a restrictive covenant upon purely private activities, and since I am more than convinced that the majority opinion conflicts with a prior decision of this Court rendered less than ninety days ago (Greco v. Orange Memorial Hospital), I am compelled, however regretfully, to dissent.

All we have in this case is that the City of Miami leased the use of the waterbottoms to a lessee which, beyond dispute, has been a private club for 88 years. As already pointed out, the City exercises no control over the club, it does not participate in its operations in any form, it has nothing to do with club membership policies. The club performs no function ordinarily attributable to the public domain. The lease is the sole nexus between the club and the city.

The majority opinion attaches much significance to the fact that without the lease there would be no yacht club. It is equally true, however, that if the Moose Lodge had been without a state liquor license it could not have sold drinks to its members and their guests, Moose Lodge No. 107 v. Irvis, 1972, 407 U.S. 163, 92 S.Ct. 1965, 32

L.Ed.2d 627. The Supreme Court held that the issuance of the liquor license did not supply the necessary state action. The significant point was that the state license required the Lodge to abide by its racially discriminatory constitution and by-laws. That was state action, but there is nothing of that kind in this case.

I think the true rule for situations of this kind was recently enunciated by the Second Circuit in New York Jaycees, Inc. v. United States Jaycees, 512 F.2d 856 (1975), a case which involved grants of federal funds to an organization which restricted its membership:

> Plaintiff concedes, as it must, that private action is immune from the restrictions of the Fifth and Fourteenth Amendments. See, e. g., Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). However, plaintiff claims that National's receipt of federal funds and tax exemptions, as well as its performance of civic functions, constitutes state action sufficient to subject it to scrutiny under the constitutional standard. We disagree.
>
> The mere existence of government ties to a private organization is not sufficient to support a finding of state action. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968). As this court stated in Powe, "[t]he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the

injury." 407 F.2d at 81. The Supreme Court has recently reaffirmed the principle that the determination of state action must be based on a particularized inquiry focusing on whether there is "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Company, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974). In this case the requisite connection between government and the offending activity has not been shown, Plaintiff does not charge discrimination in the operation of federally funded Jaycee programs; indeed such a claim could not be supported since not only do women participate both in the selection of local recipients for funding and in the implementation of programs, but also the benefits of all federally funded Jaycee programs are distributed without regard to sex or other impermissbly discriminatory criteria. Plaintiff's constitutional challenge is addressed solely to the internal membership, policies of the Jaycees; yet plaintiff has made no showing that the government is substantially, or even minimally, involved in the adoption or enforcement of these policies.

I respectfully submit that the majority in this case signally fails in its efforts to distinguish Greco v. Orange Memorial Hospital, 5 Cir., 1975, 513 F.2d 873.

In Greco the defendant was a private hospital, patronized by the public, which leased not only the land

but the building from the county. Neither the state nor the county had anything to do with its actual operation. The hospital refused to permit elective abortions. This Court held that neither federal financial assistance nor the lease of the building and grounds supplied the necessary nexus for a finding of state involvement. It was declared that the federal courts had no jurisdiction.

A hospital to which the general public has access is a far cry from a private club, which owns its facilities and performs no public function. But the present majority opinion says that state action is not in what the state does but is to be determined by who it does it to, that is, there is one law for a racial or religious complaint and yet another law for the denial of an abortion which the state is constitutionally forbidden to deny. I simply cannot grasp the logic for this kind of judicial picking and choosing.

To pursue the factual similarities, and dissimilarities, between Greco and the instant case, the following comparison is, I think, of considerable significance:

The Yacht Club Case

I

The Club owns the building and the land upon which it is situated and has since 1932.

II

The Club was built and operated with private funds and is a private organization.

III

Years subsequent to the construction of docks into and over Biscayne Bay by the Club, the City laid claim to the bay bottom land in 1962 over which such docks extended and subsequent thereto the Club has leased such bay bottom land beneath such docks for $1.00 per year.

IV

Under lease the Club assumed no obligation to the City.

V

The City has never directly or indirectly participated in the disputed alleged club policy.

The Greco Case

I

The County owns the building and the land upon which the hospital is situated and has since its inception.

II

The hospital was constructed with $1,762,000 county funds and $1,250,000 Hill-Burton funds and is open to the public.

III

The hospital leases the land and the building from the county for $1.00 per year and has since its inception.

IV

Under lease, the hospital agreed to provide certain services and operate in a prescribed manner.

V

The County neither directly nor indirectly participated in the disputed hospital policy.

From this comparison it can readily be seen that the relationship existing between the County and Orange Memorial Hospital was indeed far closer, far more significant, of longer standing and far more controlling than the relationship between the yacht club and the City of Miami. Despite such substantial involvement and interrelationship, the Greco opinion determined that the necessary "symbiotic relationship" of state action was lacking and the necessary nexus between the state's involvement and the conduct or policy complained of was absent.

The inescapable end result of the majority opinion is that a private club which leases any part of its premises from a public owner thereby loses its private status and its membership policies will be grist for the courts. As if we did not already have more to do than we can possibly perform, judges now become ex-officio managers of the membership policies of all such private clubs. One wonders

what is to become of the heretofore loudly trumpeted constitutionally guaranteed rights of privacy and freedom of association.

I now take a look at other practical effects of this decision. All around the Gulf of Mexico, the waterbottoms are publicly owned. They are trust property and cannot be sold. They can only be leased for a term of years. Under this decision we say farewell to private yacht clubs, private hunting clubs, or any other private club operating on such property and leased exclusively to a named private lessee.

But the matter does not stop there. In Mississippi, for example, there are hundreds of thousands of acres of Sixteenth Section School land (Northwest Ordinance of 1787). The State cannot sell the land. It can only lease it for a term of years. It is used for private homes, for farming, and for numerous other private purposes involving no public function. Before today it had never occurred to me that because of the leases the many private activities and occupations pursued on these lands involve significant state action.

I would hold that no significant state action is involved in this private yacht club case. I respectfully dissent.

ON PETITION FOR REHEARING
AND PETITION FOR REHEARING
EN BANC

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

It is ordered that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

HAROLD S. GOLDEN and DAVID FINCHER,
Plaintiffs,

v.

BISCAYNE BAY YACHT CLUB, CITY OF MIAMI,
a political subdivision of the State of Florida, et al.,
Defendants.

No. 72-819-Civ-NCR.
United States District Court,
S. D. Florida,
Miami Division.
Dec. 31, 1973.

ROETTGER, District Judge.

Plaintiffs, Harold S. Golden and David Fincher, a Jew and a Black respectively, brought suit against defendant Biscayne Bay Yacht Club challenging the admission policies of the Club pursuant to Title 42 U.S.C. sections 1981, 1983 and 2000a. While originally filed as a class action, the class action allegations were stricken by the

court for failure to meet the requisites of Rule 23 of the Federal Rules of Civil Procedure.

The City of Miami, its mayor and commissioners, have also been named as defendants by virtue of a city ordinance prohibiting discrimination by lessees of city-owned property.

In addition to evidence received at the trial, the court viewed the Yacht Club premises with counsel for the parties and makes the following findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT

Defendant Biscayne Bay Yacht Club was organized in 1887 to provide a meeting place for yachtsmen in early Miami.[1] In 1932, the Club purchased its present clubhouse located at 2540 South Bayshore Drive, Coconut Grove, which is adjacent to Biscayne Bay. In 1962, by virtue of a 1949 deed from The Trustees of the Internal Improvement Fund of the State of Florida, the City of Miami asserted ownership to the bay bottom land abutting the Club's property and, since that time, the Club has leased this bay bottom land from the City at an annual rental of $1.00.[2] The Club had utilized the bay bottom land previously by docks extending from the bulkhead line and after 1969

[1]At its inception, the Biscayne Bay Yacht Club was the southernmost yacht club in the United States. The Club's flag signifies this historical fact by bearing the emblem of a large N interlaced with the figures 25 signifying 25 degree north latitude.

For an interesting account of the early days of the Club, see H. Muir. Miami, U.S.A. (2d ed. 1963)

[2]Neither side has raised the issue of whether riparian rights were vested in the Club prior to 1962.

extended the piers. The docks provide for the mooring of boats for members but the general public is prohibited from tying up there. This Club is not like a number of yacht clubs whose docks appear to be a mere appendage to the club's social activities and clubhouse. Quite to the contrary, this bay bottom land is essential to the Club's functioning as a yacht club. Except for the existence of the lease, the City of Miami has never participated in or been involved in the operation of the Club.

In 1969 the City of Miami petitioned the Trustees of the Internal Improvement Fund of the State of Florida for a waiver of use restrictions[3] limiting the use of the land "solely for public purposes." In their waiver of deed restrictions, the Trustees allowed construction of the piers by the Club to "help relieve the accute (sic) shortage of public dock facilities existing in the City of Miami." (Emphasis that of court).

The City of Miami has enacted certain laws dealing with the rental of city-owned property. One section of the Miami City Code prohibits any lessee of city-owned property from discriminating against persons on the basis of race, religion, color or national origin.[4] Another provides that where the lessee is a club, there shall be no requirement

[3]The restriction provides that the land not be used for private purposes "as distinguished from any public or municipal use or purpose."

[4]Miami.Fla.Code § 38-9.1 provides:

> The lessee of any property of which the city is the owner shall not discriminate against or refuse or deny to any person or persons, guests or permittees, the use of the facilities leased from the city because of race, creed, religion, color or national origin. (Ord. No. 7668, § 1)

that applicants be sponsored as a condition for club membership.[5] These provisions are incorporated into every lease between the City and its lessees, including the lease under consideration.[6]

Membership in the Biscayne Bay Yacht Club is by sponsorship only. The By-Laws of the Club provide for invitation to membership by three sponsors consisting of a proposer and two seconders who file with the Club's secretary letters stating the candidate's qualifications for membership. These letters are accompanied by the candidate's application form which is prepared by one of the sponsors. The Secretary sends out notices to all members of the proposal for membership and any member wishing to do so may write a letter or personally appear before the membership committee to express his views regarding the candidate. All such letters are subsequently destroyed.

After "due investigation" required by the Club's By-Laws, a vote by secret ballot is held by the Board of Governors sitting as the membership committee. At least eight members are needed for a quorum. If any three members of the committee veto the candidate, no invitation is issued. The Club meets the test of being a private club and it certainly was not formed as a subterfuge to evade the civil rights laws. Stout v. Y. M. C. A. of Bessemer, Ala., 404 F.2d 687 (5th Cir. 1968); Nesmith v. Y. M. C. A. of Ra-

[5]Miami, Fla.Code § 38-9.2, sub. § A. II states:

There shall be no requirement that applicants for enrollment be sponsored by anyone as a condition to such applicant being processed or accepted for membership. (Ord. No. 7668, § 2; Ord. No. 7682, §§ 1, 2.)

However, no evidence was brought before the Court indicating the City knew the Club's membership policy was one of sponsorship only and which would have served as a primary reason for the Court awarding relief against the City.

[6]Miami, Fla.Code § 38-9.3 (Ord. No. 7668, § VI, sub. 3)

leigh, N. C., 397 F.2d 96, 102 (4th Cir. 1968); Wright v. Cork Club, 315 F.Supp. 1143, 1153 (S.D. Tex. 1970).

Since 1962, the Club has set a maximum membership of 250. The By-Laws neither expressly prohibit the presence or use of the facilities by guests of members nor do they expressly forbid membership by members of the Jewish faith or Black race. No known present or past members of the Club have been either Jewish or Black with the exception of one honorary Black member, the commodore of the Jamaica Yacht Club. The Club vigorously asserts it does not, and has not, engaged in discriminatory practices.

On February 18, 1969, plaintiff Golden sent a letter to the then commodore of the Biscayne Bay Yacht Club requesting an application for membership. A response was sent to plaintiff six days later informing him that membership was by sponsorship only. On January 14, 1972, plaintiff Fincher expressed his interest in joining the Club but was likewise refused. No proposal for membership pursuant to the By-Law provisions was ever submitted on behalf of either plaintiff.

As a result, plaintiffs brought suit for declaratory and injunctive relief, specifically requesting the court to declare that defendant Club has violated the Fourteenth Amendment to the United States Constitution and that it be enjoined from further barring of members on account of race or religion. The Amended Complaint also requested the court to enjoin the City of Miami from leasing its land to the Club until the Club ceased its discriminatory membership policies.

CONCLUSIONS OF LAW

Jurisdiction:

The court has jurisdiction of this case under Title 28 U.S.C. sections 2201 and 2202 through the provisions of Title 28 and section 1343(3) which gives the court jurisdictions over violations of Title 42 U.S.C. § 1983 where the violation occurs under color of state law or authority.

Standing:

[1] Defendant Club argues that plaintiffs cannot contest the membership policies of the Club since, never having been proposed for membership, they have suffered no injury. Both plaintiffs, upon expressing an interest in joining the Club, were told that there was nothing either could do without recommendation and this served as a sufficient rejection to give them the standing to challenge the membership policies of the defendant Club. See, e. g., Solomon v. Miami Woman's Club et al., 359 F.Supp. 41 (S.D. Fla. 1973).

Color of Law:

[2, 3] While the parties have stipulated that defendant is a private club, the fact that a club is private does not always mean that it is exempted from the operation of the Civil Rights Act. Title 42 U.S.C. § 2000a; Smith v. Y.M.C.A. of Montgomery, Inc., 462 F.2d 634 (5th Cir. 1972). Private conduct abridging individual rights does fall within the prohibitions of the Fourteenth Amendment when the state to some significant extent has been found to have become involved in it. Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

[4] In this case, the City of Miami leases publicly owned land to the defendant Club so that the Club may operate as a yacht club and provide dockage for its members. Here, the court is not faced with the "periodic" or incidental use of municipally owned recreational facilities as in the recent case of Gilmore v. City of Montgomery, 473 F.2d 832 (5th Cir. 1973). Rather, the lease under issue is on a permanent basis and, unlike the facilities in Gilmore, cannot be used by anyone other than Club members and their guests.

Neither is the court faced with the minimal degree of state involvement present in the recent Supreme Court's decision in this area, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1973). In Moose Lodge, the issuance of a liquor license to the discriminating Club was the only nexus with the State. No special benefit by reason of the liquor license was afforded the Club by the state since, like other state furnished services such as police and fire protection, water and electricity the benefits of a liquor license were potentially available to all state citizens. Here, however, the defendant Club enjoys a select privilege not available to each citizen but one coveted by many citizens in the South Florida area. More critically, the privilege is essential to the Club's operation.

The facts of the instant case also differ from the recent decision in Solomon v. The Miami Woman's Club, supra, in which this court held that the particular state lease to a state headquarters did not contain sufficient state involvement to clothe the patently discriminatory membership policies of the local private club with the color of state law. In Solomon the court was faced with an arms-length lease entered into by a municipality far from the

location of the local club. Here, the court is confronted with a lease to defendant of property vital to the operation of a yacht club. Thus, on the facts of this case, the Court holds that the "symbiotic relationship" between the state and the Club exists, thereby making any discriminatory action by the Club a violation of the Fourteenth Amendment. Burton v. Wilmington Parking Authority, supra. By virtue of the lease, the acts of the Club become those of the state and any deprivation of an individual's rights by the Club become a deprivation by the state.

Acts of Discrimination:

The total population of Dade County is 1,267,792[7] with 187,500[8] of that figure Jewish and 189,666[9] Black. With these figures in mind, it taxes credulity that the defendant Club can state without reservation that it practices no discrimination and yet, at the same time, is unable to state whether it has ever had a Black or Jewish member in its eighty-six years of operation.

[5, 6] Defendant relies on the absence of any exclusionary provision in its By-Laws to support its innocence. Certainly, the inquiry does not end there. Adams v. Miami Police Benevolent Assn., Inc., 454 F.2d 1315 (5th Cir. 1972) (whites-only clause not necessary for a finding of discrimination). Rather, the court holds that when membership in an established private club is solely by internal sponsorship and no member has ever been selected out of the large challenging group, then the membership policies of the organization are suspect. The court

[7]U.S. Bureau of Census (1970).

[8]Miami Daily News, March 13, 1972.

[9]U.S. Bureau of Census (1970.

concludes that plaintiffs have not been afforded the same rights to membership as their White and Christian counterparts.

[7] It has been long established that practices and policies which are facially neutral must be subjected to scrutiny to determine whether the practices and policies are discriminatory in operation and effect. Yick Wo. v. Hopkins, 118 U.S. 356, 6 S.Ct., 1064, 30 L.Ed. 220 (1886). This principle is embodied in Title VII of the Civil Rights Act of 1964 so that practices, policies or patterns which are neutral on their face are condemned if they operate to segregate and classify on the basis of race. Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971).

The facially neutral policy before the court is the sponsorship method of membership in the Biscayne Bay Yacht Club. While the sponsorship requirement is applicable to Black and White and Jew and Christian alike, in a club whose members from inception have been only White and Christian, the effect of the sponsorship requirement is to deny Blacks and Jews any meaningful opportunity for membership. See, e. g. Local 53 of International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Ross v. Dyer, 312 F.2d 191 (5th Cir. 1963).

The injury suffered by plaintiffs is further strengthened by factors indigenous to this community. The court takes judicial notice of the oversupply of boats

in the South Florida area in relation to the drastic shortage of dock space.[10] Indeed, the Trustees of Internal Improvement Fund, in speaking of the lease in question, recognized this as a reason to waive its deed restrictions. This fact makes even more acute the situation of the boat owner and enthusiast who, wishing to become a member of a yacht club for purposes of dockage, is denied membership on the basis of his race or religion.

The acts of defendant, evidenced by a lack of representation of these minority groups in its long history, are social discrimination at best. It is a rejection of minorities by subtle pattern or practice, one which is difficult to prove.

Plaintiff Fincher did not appear to the court to be a boating enthusiast. Plaintiff Golden testified at length about his boating skills and unequivocally asserted that the only reason the Club denied him membership is because he is Jewish; the court does not share Mr. Golden's conclusion.

The court can feel some sympathey for the Club which has been in existence nearly a decade longer than the City of Miami and which utilized the waters and the submerged lands abutting this property for thirty years prior to 1962. However, under the law the court concludes that in addition to the symbiotic relationship existing between the Club and the City there is a membership policy which is discriminatory in operation and effect. Thereupon, it is

[10]As of February of this year, South Florida had a shortage of 1900 boat slips. The Miami Herald, Feb. 15, 1973.

Ordered and adjudged as follows:

1. That the policy, practice and custom of defendant Biscayne Bay Yacht Club in denying membership to the members of the Jewish religion and Black race is hereby declared violative of the Fourteenth Amendment to the United States Constitution.

2. Defendant Biscayne Bay Yacht Club is hereby ordered to cease the barring of membership to applicants solely on account of their race or religious affiliations.

Nothing in this opinion is to be construed as indicating that any traditional quality of membership such as cordiality, achievement or integrity must be ignored by the Club: the Club may be discriminating in accepting members but not for unconstitutional reasons.

3. The City of Miami is dismissed as a defendant. City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973). The court notes that the City has adopted a resolution deferring any extension of the lease with the Club pending this decision.

[8] 4. No evidence being before the court that defendant City of Miami was aware of the discrimination practiced by the Biscayne Bay Yacht Club which would require the City to terminate its lease, and assuming that defendant Biscayne Bay Yacht Club will comply with the court's Order and immediately cease its discriminatory practices, no relief is appropriate against defendant mayor or commissioners.

5. Jurisdiction of this case is retained by the court.